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No. 86-152

Supreme Court, U.S.
FILED
JUL 31 1986
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,

Petitioner,

v.

ROBERT L. CLARKE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In 1933, Congress enacted what this Court has twice characterized as the "flat prohibitions" of the Glass-Steagall Act, in order to separate, as completely as possible, commercial banks from the securities industry. And, in 1971, this Court held that those flat prohibitions prevent the Comptroller of the Currency from authorizing national banks in general, and Citibank in particular, to organize, sponsor and underwrite units of participation in an SEC-registered mutual fund. Little more than a decade later, with no change in his statutory powers, the Comptroller has again authorized national banks in general, and Citibank in particular, to organize, sponsor and underwrite units of participation in an SEC-registered mutual fund. The court below affirmed this ruling, announcing that Congress could overturn that result "if it finds itself in disagreement with the actions of the Comptroller or the courts." These questions are presented:

1. Where the Comptroller has articulated his disagreement with the fundamental policy decisions enacted by Congress in the Glass-Steagall Act, and where the Comptroller has been unsuccessful in obtaining legislation to implement his contrary policy views, is the judiciary obligated to acquiesce in and affirm agency rulings that eviscerate the Act's flat prohibitions by engrafting upon them *ad hoc* exceptions found nowhere in the statute itself?
2. Where Congress has taken the unusual step of expressly withholding from the Comptroller *any* regulatory authority whatsoever under the Glass-Steagall Act, and where Congress has expressly considered and rejected efforts by the Comptroller and the banking industry to grant commercial banks the particular IRA mutual fund authority at issue here, may an administrative agency nevertheless arrogate to itself the power to authorize bank IRA mutual funds and to attempt to ameliorate the resulting and conceded dangers under a self-created scheme of administrative regulation?

PARTIES TO THE PROCEEDING

In addition to the petitioner and respondents listed in the caption, the following are also respondents in this action: Office of the Comptroller of the Currency and Citibank, N.A.*

*Pursuant to Rule 28.1 of this Court, petitioner states as follows: the Investment Company Institute is the national association of open-end investment companies (commonly known as mutual funds), their investment advisers and their principal underwriters. The Institute has 1,620 mutual fund members with over 20 million shareholders and assets of approximately $540 billion.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Investment Company Institute (the "Institute") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on May 20, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (1a-23a)[1] is reported at 790 F.2d 925. The opinion of the United States District Court for the District of Columbia (24a-38a) is reported at 596 F. Supp. 1496. The administrative ruling of the Comptroller of the Currency ("Comptroller") authorizing Citibank, N.A. ("Citibank") to create, sponsor and underwrite the mutual fund at issue (39a-51a) is unreported.[2]

1. Citations herein to material printed in the Appendix appear as "(a)."

2. Filed concurrently with this petition are two other petitions for certiorari seeking review of appellate decisions which address the same issues presented here and which arise out of related mutual fund rulings issued by the Comptroller and challenged by the Institute. *Investment Company Institute* v. *Clarke*, __U.S.L.W. __(U.S. filed July 31, 1986) (No. 86-); *Investment Company Institute* v. *Clarke*, ___ U.S.L.W.

JURISDICTION

The judgment below was entered on May 20, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The flat prohibitions of two sections of the Glass-Steagall Act are involved in this action.[3] Section 16 of the Act provides, in part:

> [A national bank] shall not underwrite any issue of securities or stock * * *.

Section 21 of the Act provides, in part:

> [It] shall be unlawful * * * [f]or any * * * corporation * * * engaged in the business of issuing, underwriting, selling, or distributing * * * stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits * * *.

___(U.S. filed July 31, 1986) (No. 86-). The procedural history of these cases is as follows.

The Comptroller issued his first IRA mutual fund ruling on October 21, 1982, when he authorized Citibank, N.A. to engage in the mutual fund business (39a-51a). That ruling was affirmed by the United States District Court for the District of Columbia, 596 F.Supp. 1496, and by the United States Court of Appeals for the District of Columbia Circuit, 790 F.2d 925.

On January 27, 1984, the Comptroller authorized Wells Fargo Bank, N.A. (52a-66a) and Bank of California, N.A. (67a-68a) to underwrite IRA mutual funds. These rulings were struck down by the United States District Court for the Northern District of California, 593 F. Supp. 846, but were reinstated by a divided panel of the United States Court of Appeals for the Ninth Circuit, Nos. 84-2622, 84-2623 (9th Cir. June 30, 1986), essentially for the reasons stated by the D.C. Circuit.

Finally, the Comptroller approved the mutual fund of Connecticut Bank and Trust Company, N.A. (69a-90a) on February 7, 1985. The United States District Court for the District of Connecticut affirmed in a brief opinion, 630 F.Supp. 593, which in turn was summarily affirmed by the United States Court of Appeals for the Second Circuit, 789 F.2d 175.

3. What is generally known as the Glass-Steagall Act was enacted as part of the Banking Act of 1933, 48 Stat. 162, and is codified in various sections of Title 12 of the United States Code. Relevant to this action are Sections 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378.

STATEMENT OF THE CASE

This case presents the latest effort of federal banking regulators administratively to repeal the flat prohibitions of the Glass-Steagall Act (the "Act"), the primary federal statute governing the basic structure of the financial services industry in this country. Although "Sections 16 and 21 [of the Act] *flatly* prohibit banks from engaging in the [securities] underwriting business,"[4] the Comptroller of the Currency, reversing over fifty years of long-standing construction and exercising rulemaking power expressly denied to him by Congress, has legislated a sweeping exception to this statutory bar, permitting Citibank to create, sponsor and underwrite the shares of its own mutual fund.

Wholly apart from overriding Congress' explicit, carefully considered and persistent refusal to authorize the very activities approved below, the Comptroller and the court below subverted this Court's decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*Camp*"), which expressly holds that Sections 16 and 21 of the Act forbid commercial banks to engage in the mutual fund business.[5] The Comptroller and the court below also established the *ad hoc* "system of administrative regulation" of bank securities activities that Congress repeatedly has refused to authorize and that this Court has rejected as fundamentally inconsistent with the structure and purpose of Sections 16 and 21 of the Act. *Becker, supra*, 468 U.S. at 153-54.

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4. *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 58 n.24 (1981) ("*Board of Governors*") (emphasis supplied). *Accord Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 207, 217-20 (1984) ("*Schwab*"); *Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 137, 156-57 (1984) ("*Becker*").

5. Separated in time by some 15 years, the present case and *Camp* illustrate how a tenacious administrative agency through a process of semantic manipulation can attempt to erode the express constraints of a statute with which it disagrees. As set forth below, in *Camp* the Comptroller engaged in a play on words by arguing that Citibank was not unlawfully engaged in the public offering of a mutual fund but was merely commingling managing agency accounts. A similar play on words lies at the heart of this case: the Comptroller argues that Citibank is not unlawfully engaged in the public offering of a mutual fund but is merely commingling Individual Retirement Account trusts.

In short, this case presents basic challenges, not only to Congress' substantive policy choice with respect to the scope of permissible bank securities activities, but also to Congress' structural decision to reserve to itself, rather than to delegate to any agency, the authority and responsibility for making that choice.

A. Citibank's First Attempt To Enter The Mutual Fund Business

The antecedents of this case date at least to 1965, when the Comptroller approved, as a permissible bank fiduciary service under 12 U.S.C. § 92a, a plan by Citibank to create, sponsor and underwrite a mutual fund in the form of commingling managing agency assets in a common trust fund. *Camp, supra,* 401 U.S. at 621-23.[6] Investors could participate in that mutual fund (known as the "Commingled Investment Account") by opening a bank account with Citibank of a specific size and signing a standardized, preprinted form designating Citibank as managing agent of the account. Citibank purchased for each investor "units of participation" representing his or her proportionate interest in the fund's assets, which consisted of an investment portfolio of corporate stocks and bonds. *Camp, supra,* 401 U.S. at 621-22.

At the insistence of the SEC, Citibank registered the Commingled Investment Account with the Commission as an open-end investment company (or mutual fund) under the Investment Company Act, and registered the units of participation in the mutual fund with the SEC as securities under the Securities Act. Citibank acted as investment adviser and principal underwriter to the Account, and began marketing its mutual fund shares to the

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6. "A mutual fund is an open-end investment company," *Camp, supra,* 401 U.S. at 625 n.11, regulated by the Securities and Exchange Commission ("SEC" or "Commission"). A mutual fund must be registered with the SEC under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* ("Investment Company Act"), and shares in a mutual fund, which represent the investors' undivided and redeemable interests in the fund's investment portfolio, must also be registered with the SEC as "securities" under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* ("Securities Act").

segment of the investing public it had targeted, in competition with other mutual funds. *Id.*

In 1971, this Court held that the creation, sponsorship and operation of the Commingled Investment Account unlawfully involved Citibank "in the underwriting, issuing, selling, and distributing of [mutual fund] *securities* in violation of §§ 16 and 21 of the Glass-Steagall Act." *Id.* at 639 (emphasis supplied). This Court also held that bank operation of mutual funds potentially gives rise to the hazards that Congress sought to eliminate in enacting the Glass-Steagall Act. *Id.* at 637.

B. Citibank's Current Attempt To Enter The Mutual Fund Business

In 1982, Citibank again applied to the Comptroller for approval under 12 U.S.C. § 92a to create, sponsor and underwrite a mutual fund, this time in the form of commingling certain retirement account assets in a common trust fund. The bank proposed to underwrite the shares of its fund to the general public as investments for their Individual Retirement Accounts ("IRAs"), specifically earmarked investment accounts authorized by the Employee Retirement Income Security Act of 1974 ("ERISA").

After Congress authorized IRAs in 1974, banks offered a variety of bank instruments to attract IRA dollars, such as deposit accounts and certificates of deposit, but, until this case, banks had never asserted the authority to sponsor mutual funds and to underwrite their shares as IRA investments. "With interest rates on [bank] CDs low, IRA balances higher, and the stock market up," however, Citibank decided that "it has become increasingly important for banks to [offer investors] a mutual fund investment option."[7]

Accordingly, just as in 1965, Citibank organized a mutual fund, registered it with the SEC under the Investment Company Act, and registered the "units of beneficial interest" in the fund

7. *Customers Pour Money Into Citibank's Portfolio IRA As Court Battle Continues On Glass-Steagall Charges*, Am. Banker, Apr. 9, 1986 at 24.

with the SEC as "securities" under the Securities Act. The fund is structured and operates like a garden-variety mutual fund, and is identical in all material respects to the Citibank mutual fund struck down in *Camp*.

C. The Comptroller's Ruling

On October 21, 1982, the Comptroller approved Citibank's latest mutual fund plan in the first of a series of formal IRA mutual fund rulings. Although Citibank's mutual fund shares are registered as "securities" with the SEC, and despite this Court's holding in *Camp* that mutual fund shares are "securities" within the meaning of the Glass-Steagall Act, the Comptroller ruled that the shares in *this* Citibank mutual fund do not constitute "securities" for Glass-Steagall Act purposes. The Comptroller found it dispositive that Citibank intended to underwrite the shares in its fund only to investors who executed a standardized, preprinted, IRA trust agreement (43a). The Comptroller further ruled, as he had in 1965, that Citibank's plan constituted an appropriate exercise of fiduciary powers under 12 U.S.C. § 92a (40a), in this case because of the passage of ERISA (40a-42a).

The Comptroller also opined that this specific Citibank mutual fund likely would not give rise to the various hazards that this Court has held to exist whenever banks engage in the mutual fund business, since the Comptroller asserted that he could, by regulation, ensure that some (albeit not necessarily all) of the potential dangers would not mature into actual abuses (44a-45a). Finally, and for the very first time since Congress subjected bank common trust funds to the Glass-Steagall Act more than fifty years ago, the Comptroller waived the need for Citibank to comply with his own fiduciary regulations in order to enable Citibank to register the fund and the shares thereof with the SEC and to market those securities to the public (45a, 101a-102a). The

Comptroller accompanied his ruling with a press release heralding the "*new investment opportunities*" that Citibank's mutual fund would provide (101a-102a) (emphasis supplied).[8]

Citibank promptly launched its own aggressive promotional campaign to underwrite the shares of its mutual fund to the public. Asserting that its mutual fund "is better than most *mutual funds*" (93a) because it "gives you all the advantages of a *mutual fund* and more" (92a) (emphasis supplied), Citibank proclaimed that "[i]f you want to be in the *securities* market," its mutual fund is "just what the doctor ordered" (91a) (emphasis supplied).

The Institute then commenced this action, seeking injunctive relief and a declaration that the Glass-Steagall Act prohibits such "commercial bank involvement in marketing securities," as this Court had held in *Becker*, *supra*, 468 U.S. at 148, and *Camp*, *supra*, 401 U.S. at 639.

D. The District Court Decision

The District Court upheld the Comptroller's ruling. Observing that "a definition of [the term] 'securities' exists nowhere in Glass-Steagall itself" (30a), the court acquiesced in the Comptroller's determination that the term "securities" should not apply to shares in *this* mutual fund because the shares are underwritten "only" to those 111 million investors in the nation who are eligible to open IRAs and to execute IRA trust forms (31a-32a). The District Court further determined that the Comptroller acted "reasonably" in concluding that he could, by regulation, limit the

8. Ironically, the Comptroller recognized (45a-50a) that the SEC, applying this Court's decision in *Camp*, consistently has held that bank common trust funds (and shares therein) which are mass-merchandised to the public as investment vehicles must be registered under the federal securities laws. But, recognizing that the federal securities laws and the actions of the SEC demonstrated the invalidity of his ruling, the Comptroller attacked the SEC's "unwavering position" and refused to give the securities laws any effect (46a). During the ensuing IRA mutual fund litigation, however, the Comptroller disavowed this portion of the ruling, stating that he now "in no way argues that [Citibank's] Collective Fund, and interests therein, are not subject to registration under the securities laws" (106a).

dangers that prompted Congress to exclude commercial banks from the mutual fund business (33a-35a).

The District Court also deferred to the Comptroller's interpretation of ERISA, even though that statute is a tax and labor statute (and *not* a banking statute), and even though the Comptroller concededly had no involvement in Congress' consideration or passage of ERISA. Without citation of authority, the District Court concluded that, in enacting ERISA, Congress implicitly must have intended to sanction and authorize bank IRA mutual funds (31a), even though no discussion of an intent to repeal the Glass-Steagall Act is evidenced anywhere in the language or legislative history of ERISA.

E. The Court Of Appeals Decision

The Court of Appeals upheld the Comptroller's ruling, but *not* on the bases articulated either by the District Court or the Comptroller. It conceded the "intuitive appeal" of the Institute's position that *Camp* makes it unlawful for national banks to operate a mutual fund (8a), and acknowledged that Citibank is "offer[ing] a service that, in the eyes of [bank] customers and, apparently Citibank's marketing and advertising departments, looks very much like a mutual fund" (8a). Nevertheless, the court concluded that *Camp* should not "dictate the result" in this case (11a) because investors were required to sign preprinted "trust" forms (rather than the preprinted "managing agency" forms used in *Camp*) before being sold fund shares, and because the court's own economic judgment persuaded it that this Citibank SEC-registered mutual fund "is likely to be less risky" than the Citibank SEC-registered mutual fund struck down in *Camp* (8a-11a).[9]

9. The court's economic risk analysis (9a-11a) rested primarily on factors not mentioned by the Comptroller in his ruling (44a-45a) and solely on immaterial operational differences between Citibank's current mutual fund and the Citibank mutual fund struck down in *Camp*. Whereas the Citibank plan at issue in *Camp* allowed investments of between $10,000 and $500,000 per investor and permitted the shares to be used as collateral and to be transferred, the current Citibank plan generally limits *annual* investments to $2,000 per investor, does not

The court below also announced that it deemed itself bound to defer to the Comptroller's construction of the Glass-Steagall Act (12a-13a, 18a-19a). Notwithstanding this Court's holding in *Camp* that the term "securities" in the Glass-Steagall Act plainly encompasses bank mutual fund shares, *Camp*, *supra*, 401 U.S. at 625, and notwithstanding this Court's instruction in *Becker* that the treatment afforded instruments under the Securities Act provides "considerable evidence" of Congress' intent concerning the coverage of those instruments under the companion Glass-Steagall Act, *Becker*, *supra*, 468 U.S. at 150, the Court of Appeals declared itself to be without authority to reverse the Comptroller's contrary decision because it was presented in a written document and because the document advanced "plausible reasons" for the Comptroller's contrary views (19a-20a, 23a).[10]

REASONS FOR GRANTING THE WRIT

The opinion below, which affects the permissible scope of the securities activities of the more than 33,000 depository institutions in the nation, fundamentally misconceives the role of administrative agencies and courts in effectuating the basic policy decisions Congress has mandated in the financial services arena. In *Board of Governors* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986), this Court unambiguously held that if existing banking statutes do not serve the public interest, "that is a problem for Congress, and not the [banking agencies] or the courts, to address." The court below turned this basic precept on its head. It upheld the Comptroller's ruling that national banks may engage in the mutual fund business, in direct contravention of the Glass-Steagall Act's flat prohibitions and this Court's *Camp* decision, and then justified its decision by declaring that Congress

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permit the shares in the fund to be used as collateral, and prohibits transfer of the shares. *See* I.R.C. § 408.

10. Although the court below considered itself without power to reverse the Comptroller's construction of the Glass-Steagall Act, the Court of Appeals flatly rejected the Comptroller's interpretation of, and reliance upon, ERISA (14a), thereby rendering "not relevant" a crucial underpinning of the Comptroller's ruling.

"remains free to address the issue if it finds itself in disagreement with the actions of the Comptroller or the courts" (23a n.12).

Action by this Court is necessary to reaffirm the primacy of Congress' policy decision to "separat[e] as completely as possible commercial from investment banking." *Board of Governors*, *supra*, 450 U.S. at 70. The court below acquiesced in the Comptroller's efforts to engraft a "trust" exception onto the Glass-Steagall Act and to establish the very system of *ad hoc* administrative regulation of bank securities activities that Congress consistently has declined to enact and that this Court repeatedly has refused to sanction. The effect of the Court of Appeals' opinion, if allowed to stand, would be to sanction piecemeal, but cumulatively drastic, administrative expansion of permissible bank securities activities and inevitably to expand the caseload of the federal judiciary as review of these *ad hoc* rulings is sought.

Action by this Court also is essential to promote uniformity in the application of the Glass-Steagall Act to various schemes by banks to engage in the securities underwriting business and to reaffirm the primacy of the courts on questions of statutory construction. That two other courts of appeals have deferred to the Comptroller's regulatory excesses in the IRA arena (with disparate degrees of enthusiasm) shows how widespread the problem is; that they have done so on sharply different grounds from those adopted by the Comptroller and even the court below, and with sharply different implications for the sorts of exceptions to the Act's flat prohibitions that might be tolerated in the future, shows how great is the need for this Court's direction.[11] Guidance is needed not only to assist other courts currently facing the same issues,[12] but also to resolve the inconsistencies and contradictions

11. For example, the Comptroller has ruled that ERISA constitutes a new and specific express authorization for bank IRA mutual funds (73a), or confirms prior existing authorizations (40a-42a), or both (61a). While the Second Circuit has deferred to a modified variant of the Comptroller's "confirmation" theory (630 F. Supp. at 594), the D.C. Circuit (14a) and Ninth Circuit (slip op. at 5 n.2) have expressly held that ERISA simply is "not relevant" to the issue.

12. The Institute has challenged the Comptroller's ruling authorizing First Union National Bank, N.A. to enter the mutual fund business. *Investment Company Institute* v. *Clarke*, C.A. No. C-86-0032-17

that prevent the law, as it presently exists, from offering a meaningful instruction to the lower courts beyond the demonstrably unacceptable lesson that judges must endorse and defer to whatever excuse offered by the banking regulators seems best designed to rationalize a bank's latest wish to enter the securities underwriting business by some new scheme. *Cf. Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 150-51 (1963).[13]

As the Comptroller, the banking industry and the lower courts have recognized, the issues raised by this case are of enormous legal and economic significance and warrant plenary review by this Court.[14]

(W.D.N.C. filed Jan. 24, 1986). On July 30, 1986, the United States District Court for the Western District of North Carolina stated, during oral argument on the parties' cross-motions for summary judgment, that the court would grant the defendants' motions because it was unwilling to deviate from the trend of results established by the D.C., Ninth and Second Circuits. The court has yet to issue an opinion, however, explaining its rationale for upholding the Comptroller's First Union ruling.

13. That plainly is the message that the instant judgment has sent to the lower courts, as the decision in *Investment Company Institute* v. *Clarke*, Nos. 84-2622, 84-2623 (9th Cir. June 30, 1986) demonstrates. There, a sharply divided court reversed a district court opinion that had struck down the Comptroller's Wells Fargo and Bank of California rulings. Judge Reinhardt, in what might be subtitled the "Case of the Reluctant Majority," voted with Judge Norris to reverse only on the basis of the extreme and unprecedented deference analysis applied in the opinion of the District of Columbia Circuit at issue in this petition, and notwithstanding his own view that the Comptroller's analysis is "superficial," "come[s] perilously close to disregarding the spirit of *Camp* while purporting to adhere to its letter" and "comes perilously close to rejecting the division between commercial banking and investment banking that Congress sought to mandate in Glass-Steagall." *Id.*, slip op. at 3-4.

14. The Comptroller informed the lower courts that the issues presented here are of "great significance" to "the entire banking industry and the nation's financial community" (103a), while the American Bankers Association has stated that this case "[o]bviously" presents "an issue of nationwide importance" (109a, 115a). Judge Scalia, although joining in the judgment below, nonetheless declared that this case is "such an important one that it bears a petition for certiorari to the Supreme Court" (117a), while the Ninth Circuit agreed that the issues raised herein should be decided "ultimately [by] the Supreme Court" (113a).

I.

THE JUDGMENT BELOW EVISCERATES THE GLASS-STEAGALL ACT

A. The Judgment Below Authorizes Banks To Underwrite Securities In Direct Contravention Of This Court's Decision In *Camp* And The Will Of Congress By Endorsing A "Trust" Exception Predicated On Superficial Labels

The judgment below would permit the members of the nation's banking industry to create mutual funds seeking the $250 billion currently invested in IRAs as well as "trust" money of any sort. The Comptroller's newly-discovered "trust" exception also would free bank trust departments and the more than $800 billion under their management from the reach of the Act, permitting banks to underwrite securities of any type to the more than 240 million potential "trust" customers residing in the United States.

But, in forbidding national banks to underwrite "*any* issue of securities or stock" to "*any* extent whatever," 12 U.S.C. §§ 24 (Seventh), 378(a) (emphasis supplied), Congress made its policy choice in unmistakable, unqualified, and unequivocal terms. As this Court has stated, "[t]he Act's underwriting prohibition does not demonstrate any sensitivity to the characteristics of a particular issue [of securities]; the Act simply prohibits commercial banks from underwriting them *all*." *Becker, supra*, 468 U.S. at 152-53 (emphasis supplied).

Nonetheless, the Court of Appeals approved the Comptroller's implementation of a contrary policy by approving his whole-cloth creation of a "trust" exception to the Act. In doing so, the court below impermissibly ignored the substance of Citibank's securities underwriting activity and judicially repealed Congress' legislative directives. *SEC* v. *VALIC*, 359 U.S. 65 (1959).

This Court repeatedly has instructed that the prohibitions of the Glass-Steagall Act are to be interpreted in accordance with their plain language, and are not to be accorded a narrow or

technical meaning.[15] "[T]here is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading" of the term "'securities,'" *Camp, supra*, 401 U.S. at 635, nor that authorizes the Comptroller to give that term anything other than its "ordinary meaning." *Becker, supra*, 468 U.S. at 152. After *Camp*, there is simply no longer any room to doubt that "the business of a mutual fund" consists of "'selling' 'stock' or 'other securities' evidencing an undivided and redeemable interest in the assets of the fund," and that "[o]n their face, §§ 16 and 21 of the Glass-Steagall Act * * * prohibit this activity by national banks." *Camp, supra*, 401 U.S. at 625.

Despite these precepts, the court below erroneously attributed dispositive significance to the "trust" label Citibank placed upon the standardized, preprinted forms it required investors to sign concomitantly with the purchase of shares in its mutual fund. This Court made clear in *Camp*, however, that "legal trust form" is not a license to engage in the mutual fund business,[16] and that "Congress explicitly intended [the Act] to prohibit a national bank from operating an investment trust."[17] The court below simply abdicated its responsibility, as the actions of the SEC confirm, to ensure the Comptroller's fidelity to Congress' enactment and this Court's teachings.[18]

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15. *See Becker, supra*, 468 U.S. at 150; *Board of Governors, supra*, 450 U.S. at 65; *Camp, supra*, 401 U.S. at 635; *Board of Governors* v. *Agnew*, 329 U.S. 441, 446-47 (1947); *Awotin* v. *Atlas Exchange National Bank*, 295 U.S. 209, 212 (1935) (construing terms of the McFadden Act reenacted as part of the Glass-Steagall Act).

16. 42 Fed. Res. Bull. 288 (1956), *cited with approval in Camp, supra*, 401 U.S. at 621.

17. *Camp, supra*, 401 U.S. at 635.

18. Notwithstanding Citibank's use of trust form, the SEC adhered to this Court's decision in *Camp* and required Citibank to register its fund as a mutual fund under the Investment Company Act and to register the interests therein as "securities" under the Securities Act of 1933. Because the Glass-Steagall Act and the federal securities laws constitute "several pieces of legislation collectively designed to restore public confidence in financial markets," *Becker, supra*, 468 U.S. at 150, Citibank's decision to register the shares as "securities" under the securities laws provides "considerable evidence" that the shares constitute "securities" within the meaning of the Glass-Steagall Act. *Id. See also SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 221 (1967); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943).

Nor is there any warrant for the Court of Appeals' effort "to narrow the ordinary meaning" of the term "securities" used in the Act on the basis of nonstatutory factors or to exclude securities from the Act's coverage because of the nature of the relationship between investors and the underwriting bank.[19] Apart from the fact that these efforts were tried and rejected in *Becker, supra*, 468 U.S. at 152, the "trust" factor invoked by the Comptroller and the Court of Appeals is wholly without substance, as betrayed by the very IRA accounts in issue here.

ERISA permits a bank to establish *identical* IRA accounts as *either* "trust" or "custodial" accounts.[20] And ERISA provides that an IRA "custodial" account "shall be treated as a trust" and the custodian "treated as the trustee thereof." I.R.C. § 408(h). Yet, even the Comptroller has conceded that banks may not underwrite common trust fund shares to IRA "custodial" customers as investments (111a n.10), while the banking industry has acknowledged that "[a] common investment fund in which custodial IRA accounts are commingled would seem to be indistinguishable from the commingled fund in which agency accounts had been invested by [Citibank] in [*Camp*]."[21]

19. The court below mistakenly eschewed adherence to *Camp*, *Becker* and the Act's plain language because of its fear that following those cases would prohibit "all commingling of trust funds by national banks" (11a). The Glass-Steagall Act, however, does not prohibit national banks from having "any connection with" securities; it prohibits banks from engaging "in the business" of "issuing, underwriting, selling, or distributing" them to the public, and a bank does not engage in these prohibited activities when it simply commingles the assets of preexisting trusts in a common trust fund. The Court of Appeals confused the question of whether shares in a common trust fund are "securities" with the separate question of whether the activity in which a bank engages with respect to those securities violates the Act's flat underwriting bar.

20. An IRA account is a creature of the tax law designed to serve the tax-related purpose of segregating and earmarking an eligible taxpayer's IRA investments and the income they generate, *see* I.R.C. § 408(a)(1), and of lodging in the account custodian or trustee the obligation to inform the IRS of the status of the account and of distributions therefrom, *see* I.R.C. § 408(i).

21. *Response of the American Bankers Association to the Securities Activities of Commercial Banks Study Outline* 73 (May 1976). Moreover, although Congress authorized IRAs in 1974, it was not until 1982 that national banks ever attempted to sponsor any sort of IRA

Of course, the Glass-Steagall Act nowhere distinguishes between mutual fund shares which are underwritten pursuant to standardized, preprinted *custodial* forms and those which are underwritten pursuant to standardized, preprinted *trust* forms. As noted in *Becker*, "the Act simply prohibits commercial banks from underwriting them all." *Becker, supra*, 468 U.S. at 136-37. And, when Congress wants to create exceptions to the Act's flat prohibitions, it does so itself by amending the Glass-Steagall Act. *Becker, supra*, 468 U.S. at 154. There is no "trust" exception in the Act, however, nor anything even closely resembling one.[22] By concluding that trust labels somehow might transform Citibank's mutual fund into something other than securities underwriting activity, the court below impermissibly sacrificed Congress' substantive policy goals and this Court's prior decisions to matters of form and the ingenuity of bank counsel.

B. By Approving The System Of *Ad Hoc* Administrative Regulation Previously Rejected By Congress And This Court, The Judgment Below Licenses Underwriting Activities That Foster The Very Hazards Congress Intended The Glass-Steagall Act To Eliminate

This case also raises basic questions concerning the authority of federal administrative agencies to rewrite Acts of Congress wholesale in order to expand their regulatory ambit in pursuit of their own policy objectives. The Comptroller has made plain his

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mutual fund and to underwrite the funds' shares as IRA investments. As this Court declared in *Becker*, that fact itself demonstrates that "when Congress sought to 'separat[e] as completely as possible commercial from investment banking,' * * * the banks regulated by the Act universally recognized that underwriting [IRA mutual fund shares] falls on the investment-banking side of the line." *Becker, supra*, 468 U.S. at 160. *See also BankAmerica Corp.* v. *United States*, 462 U.S. 122 (1983).

22. Rather, as this Court held in *Camp*, the Act flatly prohibits banks from "embarking upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." *Camp, supra*, 401 U.S. at 621, 638 n.37 (quoting 26 Fed. Res. Bull. 393 (1940)).

disagreement with the basic Congressional policy choices embodied in the Glass-Steagall Act (94a-100a), and publicly has committed his Office to assisting those banks that choose "not to 'wait for Congress to change the [Glass-Steagall Act] * * * to offer new products,'" a posture that the ruling under review puts into practice.[23] In fact, ever since Congress enacted ERISA in 1974, the nation's banking industry and the Comptroller have repeatedly urged Congress to amend the Glass-Steagall Act in ways which would permit banks to create IRA mutual funds and to underwrite their shares to the public. To date, however, Congress steadfastly has declined this invitation.[24]

Notwithstanding Congress' considered legislative judgment, the Court of Appeals affirmed the Comptroller's decision administratively to rewrite the Act to permit banks to operate mutual funds. That decision was impermissible for two fundamental reasons. First, the court below erroneously assumed that its *ad hoc* evaluation of the likelihood of risk inherent in the particular bank mutual fund at issue should assume primacy over Congress' deliberate generic judgment that, "[w]hen a bank puts itself in competition with mutual funds, the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking." *Camp, supra*, 401 U.S. at 637. Second, the court below improperly assumed it could disregard *Camp*'s

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23. *New Bank Powers Unlikely But Farm Debt, Court Ruling Could Spur Congress to Act*, Wash. Fin. Rep., Feb. 25, 1985, at 346.

24. *See, e.g.*, S. 1720, 97th Cong., 1st Sess. § 302 (1981); S. 2490, 97th Cong., 2d Sess. § 10 (1982); S. 2181, 98th Cong., 1st Sess. § 104(c) (1983); S. 2851, 98th Cong., 2d Sess. (1984). As Congress was advised:

> As a consequence of [the *Camp*] decision, banks * * * have not been able to provide a securities investment vehicle for their IRA customers, but rather have had to limit their service to a deposit account. With the mutual fund authority contained in S. 1720, a bank could provide to the smaller investor * * * a broader range of investment options.

Hearings on S. 1686, S. 1703, S. 1720 and S. 1721 Before the Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, Part II, 97th Cong., 2d Sess. 419 (1981) (testimony of the American Bankers Association).

teachings by relying on the Comptroller's self-proclaimed regulatory power, as well as on the presumed self-restraint of Citibank, to ameliorate the dangers inherent in bank mutual fund activities.[25]

But, when Congress wants to give banking agencies regulatory authority over particular non-banking activities, it knows how to do so and does so expressly. *See* 12 U.S.C. § 1843 (c)(8). It did not do so in the Glass-Steagall Act. *Becker, supra*, 468 U.S. at 154. Indeed, in 1935 Congress expressly refused to permit national banks, "*under regulation by the Comptroller of the Currency*, to underwrite and sell" various securities, *see* H.R. Conf. Rep. No. 1822, 74th Cong., 1st Sess. 53 (1935) (emphasis supplied), and as recently as 1980 Congress expressly reaffirmed its withholding of any and all regulatory power from the Comptroller with respect to "the securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'" *See* 12 U.S.C. § 93a. The Court of Appeals simply disregarded this Court's admonitions that "Congress rejected a regulatory approach" when it drafted the Glass-Steagall Act and that "[C]ongress has adhered to that rejection ever since." *Becker, supra*, 468 U.S. at 153.

Contrary to the premise of the court below (22a-23a), Congress did not reject a scheme of ongoing federal oversight because of concerns over whether supervision should take place under "general regulatory authority" or "specific, existing regulations." Congress rejected a regulatory approach because it determined that the very combination of commercial and investment banking activities presents temptations which may be too powerful for even conflict-conscious bankers to resist, and which are too pervasive in scope and too subtle in effect for even vigilant regulators to

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25. The court's observation that "if *Citibank* decides that its fund is becoming too risky, or is perceived by the public as too risky, the bank can gradually scale down the program by the simple expedient of diminishing its marketing efforts and retiring any units presented for redemption" (10a) (emphasis supplied) may reflect a desirable policy, but it is not the one Congress has selected. The Glass-Steagall Act reflects Congress' decision to opt for flat prohibitions, not administrative regulation or industry self-restraint. *Becker, supra*, 468 U.S. at 153-54.

control. *Becker, supra*, 468 U.S. at 147-48. Administrative regulation of any sort and in any form could at best only *reduce* the potential dangers; Congress therefore opted for a prophylactic remedy that would *eliminate* the very *possibility* of abuse. *Id.*; *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). By acquiescing in the Comptroller's disregard of this threshold legislative judgment, the Court of Appeals simply permitted the Comptroller to substitute his own policy choice for that made by Congress, and sanctioned underwriting activities that indisputably create hazards of the precise type Congress enacted the Glass-Steagall Act to eliminate altogether, rather than to ameliorate to a greater or lesser degree on an *ad hoc* basis.

II.

THE JUDGMENT BELOW REPUDIATES BOTH THE GLASS-STEAGALL ACT AND THIS COURT'S DECISIONS IN *CAMP* AND *BECKER* BY ALLOWING BANK REGULATORS TO USURP A POLICY-MAKING ROLE CONGRESS EXPRESSLY RESERVED FOR ITSELF

The Comptroller's recent spate of IRA mutual fund rulings do not represent an isolated campaign by a single banking regulator. Under increasing pressure from the institutions they regulate, the federal banking agencies have responded to Congress' refusal to amend the Glass-Steagall Act by simply rewriting it themselves. Thus,

> —although this Court held in *Becker* that Bankers Trust's marketing of commercial paper securities gives rise to all the dangers Congress enacted the Glass-Steagall Act to prevent, the Federal Reserve Board has issued a ruling reapproving Bankers Trust's commercial paper operations;[26]

26. *Commercial Paper Activities of Bankers Trust Company of New York Do Not Constitute Underwriting Securities*, [1984-85 Transfer Binder] Fed. Bank. L. Rep. (CCH) ¶ 86,270 (June 4, 1985). The United States District Court for the District of Columbia promptly struck down the ruling, *Securities Indus. Ass'n* v. *Board of Governors*, 627 F. Supp. 695 (D.D.C. 1986), and the case presently is on appeal

—although the Act prohibits depository institutions from underwriting securities "to any extent whatever," the Federal Deposit Insurance Corporation has held that banks may underwrite securities through shell subsidiaries created solely to evade the strictures of the Act;[27] and

—although the Act flatly prohibits banks from selling, distributing or underwriting "bonds," the Comptroller nonetheless has authorized banks to sell, distribute and underwrite bonds which are partially collateralized by mortgages.[28]

Moreover, further requests for rulings to engage in securities underwriting activities forbidden by the plain language of the Act's flat prohibitions are presently pending before the bank regulators.[29] Apart from the litigation these administrative exercises of legislative authority ineluctably generate, efforts to dismantle the Glass-Steagall Act by administrative fiat have triggered a veritable flood of additional revisionist activity and have inflicted serious damage upon the carefully balanced and intertwined statutory scheme Congress legislated to govern the securities and banking industries.[30]

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before the District of Columbia Circuit. *Securities Indus. Ass'n* v. *Board of Governors*, Nos. 86-5089, 5090, 5091, 5139 (D.C. Cir.).

27. *FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Nonmember Banks*, 47 Fed. Reg. 38,984 (1982). The ruling is under challenge. *Investment Company Institute* v. *FDIC*, 606 F. Supp. 683 (D.D.C. 1985), *appeal pending*, Nos. 84-1616, 85-5769 (D.C. Cir.).

28. *Letter No. 362*, [Current] Fed. Bank. L. Rep. (CCH) ¶ 85,532 (May 22, 1986).

29. For example, several banks have applied to the Federal Reserve Board to underwrite a whole host of securities through non-bank holding company subsidiaries, while other banks have made known their intent to seek even greater powers in the event the applications are granted. *See, e.g., Banks Will Seek New Authority From Fed If Securities Applications Are Approved*, Wash. Fin. Rep., May 26, 1986, at 893.

30. For example, because Congress understood the Glass-Steagall Act to foreclose banks from engaging in the securities underwriting business, Congress excepted banks from the definition of the terms "broker" and "dealer" in the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78c(4),(5). In light of the recent rulings of the federal banking agencies, however, the SEC has administratively repealed the exception Congress wrote into the statute. *See* 48 Fed. Reg. 51,930 (1983). Although the SEC's rule was unsuccessfully challenged by the

Notwithstanding the frontal challenge to the Act's flat prohibitions embodied in the ruling under review, the court below upheld the Comptroller's statutory construction merely because it was presented in a written document and because the document advanced "plausible reasons" for the Comptroller's contrary views (23a). In doing so, the court abdicated the judiciary's fundamental responsibility "to construe the language employed by Congress." *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969). Administrative deference requires more than a court's ability "to 'conceive a basis' for administrative action." *Bowen* v. *American*

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banking industry, the litigation remains in the courts. *See American Bankers Ass'n* v. *SEC*, C.A. No. 85-2482 (D.D.C. Oct. 30, 1985), *appeal pending*, No. 85-6055 (D.C. Cir.).

Moreover, should this Court sustain the Comptroller's ruling in this case, similar statutory surgery can be expected by the SEC. In 1970, Congress specifically amended the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 *et seq.*, ("Advisers Act") to require that all investment advisers to mutual funds register as "investment advisers" with the SEC, thereby subjecting them to the regulatory regime of that law. *See* H.R. Rep. No. 1382, 91st Cong., 2d Sess. 13, 39 (1970). Consistent with the preexisting statutory pattern which contemplated a total separation between the banking and securities industries, however, Congress permitted banks to retain their exemption from registration under the Advisers Act. 15 U.S.C. §80b-2(a)(11); *see* H.R. Conf. Rep. No. 1631, 91st Cong., 2d Sess. 28-29 (1970). As a result, Citibank has not registered under the Advisers Act, even though it now is an investment adviser to a registered mutual fund. The result is that, unless the SEC administratively acts to fill the regulatory void by amputating the statutory exception for banks, investors in Citibank's mutual fund will be deprived of the very protections that Congress in 1970 decided should be extended to all mutual fund investors.

Even if the SEC assumes the authority to strip the Advisers Act of its bank exemption, however, this administrative revision of the statutory structure would still not suffice, in the view of the SEC, adequately to protect investors in bank sponsored mutual funds. Two successive SEC Chairmen have informed Congress that the existing federal securities laws, even if applied to bank mutual funds, are not adequate to cope with the unique conflicts of interests and other financial dangers which would arise from the entry of banks into the mutual fund business. *See, e.g., Hearings on S.1686, S. 1703, S.1720 and S.1721 before the Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, Part II*, 97th Cong., 2d Sess. 914 (1981) (Statement of SEC Chairman John S.R. Shad); *Hearings on H.R. 1539, H.R. 2747 and H.R. 2856 before the House Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. 17 (1979) (Statement of SEC Chairman Harold W. Williams).

Hospital Association, 106 S.Ct. 2101, 2112 (1986). Indeed, only last Term this Court reaffirmed that "[a]gency deference has not come so far" as to amount to the virtual "*carte blanche*" extended to the Comptroller by the court below. *Id.* at 2122.[31] The judgment below represents nothing less than "judicial inertia resulting in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

The nature of the ruling under review confirms that the Court of Appeals' refusal to perform the "quintessential judicial function" of statutory construction was particularly mistaken here. *BATF* v. *FLRA*, 464 U.S. 89, 98 n.8 (1983). While this Court has recognized that judicial restraint might be appropriate in evaluating agency decisions which reflect a cautious or limiting construction of agency authority *vis-a-vis* coordinate branches of the federal government or the States, this Court consistently has insisted upon close scrutiny of agency decisions which, as here, reflect self-aggrandizing bureaucratic behavior dismissing Congress' fundamental policy decisions and objectives.[32] The Comptroller's transformation of a clear, proscriptive statute broadly forbidding bank securities activities into a regulatory statute permitting their *ad hoc* administrative authorization, based upon the agency's own assessment of the risks and dangers involved, and notwithstanding Congress' refusal to grant regulators such authority in the first place, plainly demanded heightened, not relaxed, judicial review.[33]

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31. A "reviewing court '*must* reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'" *Becker, supra*, 468 U.S. at 143 (quoting *Federal Election Comm'n.* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981)).

32. *Compare Federal Deposit Ins. Corp.* v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) *and Northeast Bancorp, Inc.* v. *Board of Governors*, 105 S. Ct. 2545 (1985) *with NLRB* v. *Financial Institute Employees*, 106 S. Ct. 1007 (1986); *Board of Governors* v. *Dimension Fin. Corp.*, 106 S. Ct. 681 (1986); *Lowe* v. *SEC*, 105 S. Ct. 2557 (1985), *and Becker, supra*, 468 U.S. at 142-44.

33. *See* 12 U.S.C. § 93a; *Becker, supra*, 468 U.S. at 153-54.

Even beyond the improper standard applied by the Court of Appeals, the deference accorded the Comptroller's ruling is untenable. The rationales proffered by the Comptroller in support of bank-operated IRA mutual funds have so changed over time and so differed from ruling to ruling that they do not reflect the consistency this Court has required as a prerequisite to any judicial deference. *Bowen* v. *American Hospital Association, supra*, 106 S.Ct. at 2122 n. 34.[34] And the Court of Appeals deferred in important respects not to any reasoned application of agency "expertise" embodied in the Ruling under review, but essentially to bald and unsupported statements in the Comptroller's ruling and to the *post hoc* rationalizations of the Comptroller's litigation counsel.[35]

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34. The efforts of the Comptroller and his counsel to avoid the fatal impact of the federal securities laws upon the Comptroller's IRA mutual fund rulings provide a good case in point. In his Citibank ruling, the Comptroller agreed that the term "securities" as used in the federal securities laws and the Glass-Steagall Act generally are "synonymous" (44a), but nonetheless declined to apply the securities laws so as not to undermine his position that the shares in the Citibank mutual fund represent only "the formal manifestation of a traditional banking service" (44a). In the district court, counsel for the Comptroller abandoned this rationale and argued, relying upon the Court of Appeals opinion in *Becker*, that the federal securities laws are irrelevant because the securities laws and the Glass-Steagall Act supposedly were intended to serve completely unrelated purposes. *Defendants' Memorandum of Points and Authorities In Support of Their Motion for Summary Judgment* at 17-18. The Comptroller subsequently adopted his counsel's view in the Wells Fargo IRA mutual fund ruling (65a-66a). Counsel in turn abandoned the Comptroller's position during the Wells Fargo litigation after this Court handed down its decision in *Becker*. *Defendants' Reply Brief* at 24. Then, following issuance of the district court opinion in the Ninth Circuit Wells Fargo case, counsel finally adopted the rationale that the federal securities laws are irrelevant in construing the Glass-Steagall Act because the securities laws definitions are overinclusive. The Court of Appeals in this case approved this most recent formulation (11a).

35. The Court of Appeals' opinion bears only faint resemblance to the Comptroller's ruling. For example, the Comptroller devoted much of his ruling to demonstrating how ERISA allegedly confirms his authorization of Citibank's latest mutual fund (40a-42a), while the court below expressly held that ERISA is "not relevant" to the issues raised by this case (14a). The Comptroller also devoted several pages of his ruling to a blistering attack on the SEC's "unwavering position" that bank common trust funds which are mass-merchandised to the

Under these circumstances, the Court of Appeals' failure to honor its Article III responsibilities transformed the practice of judicial deference to agency actions in areas committed to agency expertise into an excuse for judicial adbication to an agency's arrogation of power inconsistent with Congress' own substantive and structural plan. The court's answer that Congress "remains free to address the issue if it finds itself in disagreement with the actions of the Comptroller or the courts" (23a n.12) just will not do. If existing banking statutes do not serve the public interest, "that is a problem for Congress, and not the [banking agencies] or the courts, to address." *Board of Governors* v. *Dimension Financial Corp., supra*, 106 S.Ct. at 689.

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public as investment vehicles must be registered under the federal securities laws (45a-50a) (an attack the Comptroller subsequently and expressly disavowed during the Second Circuit litigation (106a)), whereas the court below properly accepted the SEC's interpretation of its own organic statutes. Finally, although the court below discussed all (and even purported to defer to the Comptroller on some) of these matters, the remaining pages of the Comptroller's ruling do not even attempt to analyze the language or legislative history of the Glass-Steagall Act (42a-43a), do not mention, much less discuss, the four characteristics which the court below apparently believed to render Citibank's IRA mutual fund "less risky" than the Citibank mutual fund at issue in *Camp* (44a-45a), and do not even inquire into the ability of Citibank to satisfy its fiduciary obligations in light of the Comptroller's unprecedented waiver of his own fiduciary regulations to permit Citibank to transfer exclusive fund management to the fund's Supervisory Committee in accordance with the requirements of the Investment Company Act (50a-51a).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 31, 1986

CORRECTED COPY

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,

Petitioner,

v.

ROBERT L. CLARKE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 85-5019

INVESTMENT COMPANY INSTITUTE,

Appellant

v.

C.T. CONOVER, COMPTROLLER OF THE CURRENCY, *et al.*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-0549)

Argued December 11, 1985

Decided May 20, 1986

Harvey L. Pitt, with whom *Henry A. Hubschman* and *David M. Miles* were on the brief for appellant.

L. Robert Griffin, Attorney, Office of the Comptroller, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice and *Richard V. Fitzgerald*, Chief Counsel, Office of the Comptroller were on the brief for appelles, C.T. Conover, et al.

Arnold M. Lerman, with whom *Michael S. Helfer, Christopher R. Lipsett* and *Daniel M. Drory* were on the brief for appellee, Citibank.

John J. Gill and *Michael F. Crotly* were on the brief for amicus curiae, American Bankers Association urging affirmance.

Before: SCALIA and STARR, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: This case brings us once more into the legal battle between the banking and securities industries over the former's movement into business domains which the latter

considers its own. The Investment Company Institute is a national association of investment companies, investment advisors and underwriters. The Institute brought an action for declaratory and injunctive relief in the District Court, challenging a decision by the Comptroller of the Currency allowing Citibank to establish and market a "Collective Investment Trust" for assets of Individual Retirement Accounts, commonly known as "IRAs." The Institute contended that Citibank's Trust is functionally equivalent to a mutual fund, and that Citibank could not operate the Trust without running afoul of the 1933 Glass-Steagall Act. That Act was designed to preserve public confidence in commercial banks like Citibank by keeping them out of the securities business.

The District Court granted the Comptroller's motion for summary judgment, *Investment Co. Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984), and the Institute appealed. The sole issue before us is whether "units of beneficial interest," or shares, in Citibank's Trust constitute "securities" within the meaning of sections 16 and 21 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (Seventh), 378(a)(1) (1982) ("the Act"). The Comptroller concluded that the units are not "securities" for purposes of the Act, and that Citibank could therefore lawfully offer the units to the public. The District Court agreed with the Comptroller, thereby disagreeing with the then only other judicial decision on this issue, *Investment Co. Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984) (Schwarzer, J.), *appeal pending*, Nos. 84-2662/2663 (9th Cir.).[1] Guided by the deference principles enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984), we uphold the Comptroller's interpretation of the Act and affirm.

1. Subsequent to the District Court's decision, the U.S. District Court in Connecticut agreed with the court below, holding that Citibank's Trust does not run afoul of the Glass-Steagall Act. *See Investment Company Institute v. Clarke*, Civil No. H 85-160 (D. Conn. Jan. 21, 1986) (Cabranes, J.), *aff'd mem. per curiam*, No. 86-6033 (2d Cir. May 2, 1986).

I

An understanding of the specific dispute before us requires familiarity with a portion of the elaborate federal statutory scheme governing national banking activities and the newer provision of federal law permitting IRAs, an acquaintance with the structure of Citibank's Trust, and an appreciation of the procedural history of this case.

A

Enacted in the shadows of the 1929 stock market crash and the ensuing banking collapse, the Glass-Steagall Act prohibits national banks from engaging in the securities business. Section 16 of the Act forbids national banks to underwrite or deal in "securities or stock." 12 U.S.C. § 24 (Seventh).[2] Section 21 in turn prohibits anyone in the business of underwriting, selling, or distributing "stocks, bonds, debentures, notes or other securities" from taking deposits. 12 U.S.C. § 378(a)(1).[3] The term "securities," however, is left undefined by the Act. The leading

2. Section 16 provides in relevant part:

> The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock.

12 U.S.C. § 24 (Seventh) (1982)

3. Section 21 provides in relevant part:

> [I]t shall be unlawful—
>
> (1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor.

12 U.S.C. § 378(a)(1). Section 20 of the Act does, however, permit certain corporate affiliations between national banks and securities companies. 12 U.S.C. § 377.

Supreme Court case construing that term, *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971), overturned an earlier ruling by the Comptroller allowing Citibank to operate a "collective investment fund." *Camp* held, in brief, that the "units of participation" in Citibank's fund constituted "securities" within the meaning of the Act because, in the Court's view, contributions to Citibank's fund were made for "investment" purposes rather than true fiduciary purposes, and because Citibank's arrangement would likely pose several of the hazards to the banking system that Glass-Steagall was designed to eliminate. *See* 401 U.S. at 630-38.

Also of relevance in this case is the Employee Retirement Income Security Act (ERISA), enacted by Congress at 1974. Among other things, ERISA added a provision to the Internal Revenue Code permitting qualified individuals to deduct investments in IRAs from taxable income up to a specified amount, currently $2,000 annually. 26 U.S.C. § 408(a)(1) (1982). Such contributions, together with earnings on IRA assets, are not taxed until distribution or withdrawal, *id.* § 408(d) (1), but a ten percent tax penalty is imposed if the account holder withdraws the funds before reaching the age of 59½, *id.* § 408(f) (1). Section 408(a)(2), moreover, requires specific approval by the Secretary of the Treasury before a bank or other institution may serve as trustee for IRA trust assets. These assets may only be commingled in a common investment fund or trust fund. *Id.* § 408(a) (5).

B

In 1982, Citibank established a common trust fund for IRA investors. A common trust fund is a device, long known to the banking industry, by which a bank commingles the assets of individual trusts and invests those assets collectively. The assets of each participating trust are exchanged for an undivided ownership interest in the common trust fund, with the ownership interest being proportionate to the assets contributed by each trust to

the fund's total assets. This device obviously permits each participating trust to enjoy greater diversification and wider investment opportunities than would otherwise exist. It also permits banks, acting as trustees, to manage trusts that are too small to be managed individually. National banks have operated such funds since at least 1936, when the Federal Reserve Board specifically authorized their establishment. *See* 1 Fed. Reg. 417, 420 (1936) (amending Regulation F).

Styled a "Collective Investment Trust," the Citibank trust fund at issue here consists of four separate investment portfolios into which an individual may instruct Citibank to place his or her IRA trust assets. This is accomplished by means of a written trust agreement, which is freely revocable save for the ten percent penalty imposed by I.R.C. § 408. An individual's ownership interest in the entire trust fund is expressed in terms of "units of beneficial interest," which are available only to Citibank IRA-holders and are non-transferable. IRA assets may, however, be freely transferred among the four portfolios, as well as among any of Citibank's other IRA programs. Citibank serves as trustee and investment advisor to the trust fund and receives a monthly fee based in part on the net value of the fund's portfolios. In order to comply with SEC requirements, however, Citibank has placed the fund under the ultimate control of an independent five-member "supervisory committee," which essentially serves as a board of directors. Citibank has marketed its fund as an alternative to, or a competitor of, similar programs now being offered by mutual funds.

C

Citibank first sought approval of its Collective Investment Trust from the Securities and Exchange Commission, which has in the past opined that ownership interests in collective trust funds are "securities" for purposes of the federal securities laws. Although not conceding the correctness of the SEC's interpretation, Citibank registered the Trust as an investment company under the Investment Company Act of 1940, and registered the

units of beneficial interest as securities under the 1933 Securities Act.[4]

Citibank then sought approval of the Trust from the Comptroller of the Currency, who has statutory responsibility for regulating fiduciary activities of national banks. 12 U.S.C. § 92a (1982). Citibank asked the Comptroller to determine that its operation of the Trust did not violate the Glass-Steagall Act; it also asked for exemptions from those regulations that Citibank feared might conflict with requirements imposed by the SEC pursuant to the Investment Company Act.

On October 28, 1982, the Comptroller issued a final ruling approving the Citibank Trust. J.A. at 174. The Comptroller found Citibank's operation of the Trust to be authorized by applicable trust regulations and granted the requested exemptions. Importantly for present purposes, the Comptroller provided a lengthy analysis of the applicability of the Glass-Steagall Act to the Trust, concluding that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." *Id.* at 180.

Much of the Comptroller's discussion of the Glass-Steagall Act centered on the Supreme Court's 1971 decision in *Camp*. After noting certain "general similarities" between the present Trust and the Citibank fund at issue in *Camp*, the Comptroller offered two reasons why the units of beneficial interest in the Trust should not be considered "securities" for purposes of Glass-Steagall. *First*, unlike the arrangement in *Camp*, Citibank receives the IRA assets *in trust* rather than in a "managing agent" capacity. The Comptroller observed that, as *Camp* had recognized, national banks have long enjoyed authority to commingle funds received in trust. *See id.* at 179. In light of this long established authority, the Comptroller concluded that "when, as in the present case, the 'securities' merely represent the formal manifestation of a traditional banking service, . . . the prohibitions of the Glass-Steagall Act are not applicable." *Id.* at 180. According to the Comptroller, moreover, "the meaning of the term securities

4. Citibank asserts that these actions were taken merely to avoid a potentially expensive, protracted dispute with the SEC.

under the securities law [is] not necessarily synonymous with its meaning under the Glass-Steagall Act." *Id.*

Second, the Comptroller concluded that Citibank's operation of the Trust entails none of the "hazards and potential abuses" identified by the Supreme Court in *Camp*. The Comptroller explained in detail his reasons for so believing, concluding that "because the potential for abuse is non-existent or negligible here, and because this is essentially a traditional banking service, it would be inappropriate to conclude that there is any security here for purposes of the Glass-Steagall Act." *Id.* at 182.

The Institute then brought this action for declaratory and injunctive relief. Granting the Comptroller's cross-motion for summary judgment, the District Court held that the Comptroller's decision was entitled to "great weight," and that the Comptroller had acted reasonably in interpreting Glass-Steagall as not prohibiting Citibank's Trust. It is from this adverse decision that the Institute appeals.

The Institute's principal argument is that Citibank's Trust is flatly prohibited by *Camp*. We address this contention first. After concluding that the Trust is not forbidden by Camp's teaching, we analyze the Comptroller's ruling under the governing legal framework as set forth in *Chevron*. The latter discussion also address the Institute's two remaining contentions, namely that ERISA does not authorize Citibank's operation of its Trust and that the District Court improperly deferred to the Comptroller's statutory interpretation.

II

Despite our ultimate determination that *Chevron's* deference principles govern, we first examine the Institute's vigorously pressed contention that *Camp* itself disposes of this case, requiring invalidation of Citibank's latter-day efforts to compete with the mutual fund industry. As we understand its argument, the Institute asserts two independent grounds for this position. First, *Camp* makes it unlawful for national banks to operate a mutual fund, which, the Institute contends, is exactly what the Trust

amounts to. Institute Brief at 1-2; Reply Brief at 1. Second, under *Camp*, the term "security" includes any "undivided and redeemable interest in the assets of a common trust fund." Institute Brief at 19; Reply Brief at 3.

A

The strength of the Institute's first argument lies in its intuitive appeal, for *Camp* indeed overturned the Comptroller's earlier attempt to authorize Citibank's operation of what amounted to a mutual fund. Now Citibank—again with the Comptroller's approval—is attempting to offer a service that, in the eyes of many customers and, apparently, Citibank's marketing and advertising departments, looks very much like a mutual fund. To call Citibank's fund anything but a mutual fund, according to the Institute, is to exalt form over substance.

In our view, however, *Camp* cannot fairly be read to prohibit any financial service that some actors in the marketplace view as functionally similar to a mutual fund. *Camp* nowhere states that all such services are prohibited. To be sure, the Court found significant the fact that the fund at issue there was "in direct competition with the mutual fund industry." 401 U.S. at 625. But the mere existence of such competition was not the decisive element in the Court's analysis.

More fundamentally, Citibank's Trust is, upon close analysis, quite distinct from the fund at issue in *Camp*. As the Comptroller found, the principal difference is that Citibank serves as trustee of its IRA funds rather than as managing agent, the situtation before the Court in *Camp*. Although the Institute devotes considerable energy to arguing why this distinction is irrelevant, *see, e.g.*, Institute Brief at 11-12; Reply Brief at 3, *Camp* itself suggests otherwise. After expressly observing that "the investment fund plan as established does not provide that the bank receives the investor's money in trust," 401 U.S. at 622 n.8, the Court stated:

> For at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the

> banking laws, commingle trust funds on the one hand, and act as managing agent on the other. No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character.

401 U.S. at 624-25. According to the Court, then, it was the *combination* of the bank's commingling of trust assets *and* its acting as managing agent (rather than trustee) that spawned Glass-Steagall concerns. Here, by contrast, Citibank is seeking to exercise only one of the two powers which *Camp* held could not be joined: the power to commingle trust funds. The existence of a trust relationship is sufficient, by itself, to take this case out of *Camp's* express teaching.

But even if the investment fund at issue in *Camp* had employed a trust device, our case would still not be on all fours. *Camp* evinces the Court's concern with the risks to which a national bank might subject itself in offering a new, unconventional product. In the Court's analysis, whether such a product is a "security" depends to some extent on whether, from the bank's perspective, the product entails the relatively small risks presumably characteristic of commercial banking or, as in *Camp*, the relatively large risks (either real or apparent) usually associated with investment banking. *See* 401 U.S. at 629-33, 636-38. This concern also appears to underlie the Camp Court's attempt to determine whether a financial service represents a "fiduciary" service or a run-of-the-mill "investment." *See* 401 U.S. at 621,638. The Court in *Camp* was constrained to undertake an analysis of economic effects since, as discussed more fully below, the Comptroller in that case had not bothered to shed any light whatever as to Glass-Steagall's meaning. *See* 401 U.S. at 626-27. In order to determine whether *Camp* controls this case,[5] we

5. Again, in the case at hand, we have the benefit of the Comptroller's analysis and reasoning under Glass-Steagall. What follows in the

are obliged to examine some of the economic effects of Citibank's Trust.

We see four reasons why, from a banking perspective, the Citibank Trust is likely to be less risky than the investment fund at issue in *Camp*. First, customers of the *Camp* investment fund were permitted to invest between $10,000 and $500,000. 401 U.S. at 622. Here, by contrast, ERISA imposes a limit of $2,000 per person per year. 26 U.S.C. § 408(a)(1). This limitation, it seems to us (as it seemed to the Comptroller), makes it less likely that Citibank would be tempted to engage in unsound lending practices in order to attract retain particularly valued customers. This was one of the "subtle hazards" identified in *Camp*. *See* 401 U.S. at 632, 637-38.

Second, Citibank's units may not be used as collateral, unlike the investment fund shares in *Camp*. This, again, is assured by ERISA. *See* 26 U.S.C. § 408(e)(4). One would expect this limitation to reduce Citibank's risk by preventing it from selling its units "on the margin," that is, financing a portion of the purchase price with a loan secured by the shares. Margin selling was, of course, one of the lending abuses widely thought to have contributed to the unhappy events of 1929.

Third, unlike the investment fund shares in Camp, Citibank's units are non-transferable. *See, e.g.*, J.A. at 50 (Citibank prospectus). This restriction naturally impedes formation of an independent "market" in the units, and thereby allows Citibank more control over the aggregate size of the Trust. For example, if Citibank decides that its Trust is becoming too risky, or is perceived by the public as too risky, the bank can gradually scale down the program by the simple expedient of diminishing its marketing efforts and retiring any units presented for redemption. By contrast, if the units were transferable, owners wishing to trade their units for cash could do so by selling them to a third party rather than redeeming them at Citibank.

Finally, the ten percent income tax penalty imposed by ERISA for early redemption would seem to reduce the risk that Citibank

---

text is our analysis of the Institute's argument that *Camp* itself entirely controls this case.

will be called upon to redeem large numbers of units at any one time. This was another concern animating the Court in *Camp*. The Court feared that, if confronted with such circumstances, "a bank might find itself under pressure to rescue the fund through measures inconsistent with sound banking." 401 U.S. at 637.

For all these reasons, we believe the Trust at issue here is distinguishable in significant respects from the managing-agent fund in *Camp*.

B

The Institute's second argument under *Camp* is less plausible. The Institute cites that case for the proposition that the term "security" necessarily includes any "undivided and redeemable interest in the assets of a common trust fund." Institute Brief at 1-2; Reply Brief at 3. *Camp* will be searched in vain for any statement of this sweeping proposition. The Institute has arrived at this understanding by splicing together unrelated phrases from different parts of the *Camp* opinion. This effort, albeit creative, is unavailing.

The Institute's argument, moreover, proves far too much. If the term "security" were indeed interpreted as broadly as the Institute's suggests, then any ownership interest in a bank's common trust fund would constitute a security, and all commingling of trust funds by national banks would be effectively prohibited. We are at a loss to determine how a national bank could pool the assets of various trusts without creating some kind of certificates or other instruments setting forth the ownership interests of each of the participating trusts in the common trust assets. But such commingling, as we have seen, has historically been permitted and is clearly sanctioned by *Camp*. *See* 401 U.S. at 624-25.

For the foregoing reasons, we conclude that *Camp* does not dictate the result demanded by the Institute here. This conclusion does not, of course, mean that the decision is in any wise to be ignored. To the contrary, as the discussion which follows demonstrates, *Camp* informs our analysis of whether the Comptroller's

interpretation of Glass-Steagall can be upheld under the principles enunciated in *Chevron*. We turn now to that analysis.

III

Over the years, the Supreme Court has frequently stated that courts should defer to reasonable interpretations of statutes by the administrative agencies charged with their administration. A generation ago in the landmark case of *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *Id.* at 131. The Court observed that the agency's interpretation should be accepted as long as it has " 'warrant in the record' and a reasonable basis in law." *Id.* In another leading case, *Red Lion Broadcasting Company Co. v. FCC*, 395 U.S. 367 (1969), the Court stated that an agency's interpretation "should be followed unless there are compelling indications that it is wrong," *id.* at 381.

Notably, the *Camp* majority reaffirmed this principle. The Court's declination to defer to the Comptroller signaled no departure from this settled principle, but was occasioned instead by the Comptroller's complete silence as to the meaning of the governing statute. That is to say, there was in *Camp* no explicit interpretation of the Glass-Steagall Act to which the Court could appropriately defer. The court's comments in this respect are highly instructive:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. . . .
>
> The difficulty here is that the Comptroller adopted no expressly articulated position at the administrative level as

> to the meaning and impact of the provisions of §§ 16 and 21 [of the Glass-Steagall Act] as they affect bank investment funds. The Comptroller promulgated Regulation 9 without opinion or accompanying statement.

401 U.S. at 626-27 (citation omitted). This statement suggests a fundamental difference between this case and *Camp*. Here, in the administrative proceedings, the Comptroller provided a thorough, explicit interpretation of Glass-Steagall as it applies to this case. We are therefore duty bound, as *Camp* teaches us, to give "great weight" to that interpretation.

Subsequent to *Camp*, the Supreme Court has provided more specific guidance on the application of deference principles. The most important decision for our purposes is *Chevron*, which set forth a now familiar framework for analyzing interpretations of statutes by agencies charged with their administration. First, the court must determine whether Congress "has directly spoken to the precise question at issue." *Id.* at 2781-82. This inquiry entails an examination of the statute and, if necesary, resort to the pertinent legislative history. If Congressional intent is unclear after this interpretative exercise, then the reviewing court is called upon to determine whether the agency's interpretation is "permissible," that is to say reasonable. *Id.* at 2783. If it is, then the agency's interpretation must stand.[6]

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6. The Supreme Court has explicitly applied this analytical framework at least four times since *Chevron was decided*. *See Chemical Mfrs. Ass'n v. NRDC*, 105 S. Ct. 1102 (1985) (upholding EPA interpretation of Clean Water Act, thereby permitting EPA to grant variances from the EPA's effluent limitations by showing that effluent sources were "fundamentally different" from other effluent sources within a particular EPA category); *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 445 (1985) (upholding interpretation of Clean Water Act by the Army Corps of Engineers forbidding construction on wetlands without prior approval by the Corps); *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986) (rejecting interpretation of Bank Holding Company Act by Federal Reserve Board in the face of clearly expressed congressional intent); *United States v. City of Fulton*, 106 S. Ct. 1422 (1986) (upholding interpretation of Flood Control Act of 1944 by Secretary of Energy).

A

In applying the first prong of the *Chevron* analysis, the inquiry before us is whether the framers of Glass-Steagall intended to prohibit national banks from engaging in activities like that at issue here. Although both the Comptroller and Citibank vigorously urge us to consider *ERISA's* legislative history, that history is not relevant here for two reasons: *first,* in enacting ERISA, Congress in no wise purported to amend Glass-Steagall; *second,* nothing in ERISA or its legislative history suggests that Congress as a whole had any view, let alone a clear intent, on the applicability of Glass-Steagall to the operation of IRA collective trusts by national banks. Any inferences that might be drawn from ERISA or its legislative history "cannot substitute for a clear expression of legislative intent" by the framers of the Glass-Steagall Act itself. *See Southeastern Community College v. Davis,* 442 U.S. 397, 411 n.11 (1979).

1

In applying the first part of the *Chevron* analysis, we must first look to the language of the statute itself. Inasmuch as the term "security" is not defined in the Act, we must " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Securities Industry Ass'n v. Board of Governors,* 104 S. Ct. 2979, 2986 (1984) (Becker) (quoting *Richards v. United States,* 369 U.S. 1, 9 (1962)). The Institute urges us simply to borrow the definition used in the federal securities laws. Under this view, any instrument registered as a security with the SEC would be considered a security for Glass-Steagall purposes.

The Institute relies heavily upon the Supreme Court decision in *Becker, supra,* for this argument. There, the issue was whether the term "security" includes commercial paper, which all parties to that litigation agreed is simply an unsecured promissory note. The Court held that commercial paper falls within the plain meaning of the term "note," since the term "security" explicitly includes all notes, commercial paper is therefore a "security."

See 104 S. Ct. at 2986-88. The Institute interprets *Becker* as holding that SEC registration itself constitutes "considerable evidence" that the instruments at issue are "securities" within the meaning of Glass-Steagall. Institute Brief at 20.

Fairly read, however, Becker does not stand for this proposition. To be sure, the Court found that *Congress'* explicit inclusion of commercial paper as a "security" for purposes of the securities laws was an indication that Congress considered commercial paper to be a "security" for Glass-Steagall purposes as well. But the Court did not indicate that SEC registration by itself bears on the classification of a financial instrument as a "security" within the meaning of the banking statute.[7] Nor did *Becker*, as the Institute suggests, hold as a general matter that the term "security" itself has an ascertainable ordinary meaning in all contexts.[8] As already noted, the majority opinion in *Becker* relied primarily on the plain meaning of the term "note," not on the plain meaning of the term "security."[9]

As we see it, the statutory language is of limited help in divining Congressional intent in this case. The term "security" clearly encompasses instruments like stocks, bonds, notes, and mutual fund shares, which have traditionally been underwritten and marketed by members of the securities industry. As *Camp* teaches,

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7. As the Becker dissent pointed out, the definition of the term for securities law purposes should be different from that used in a Glass-Steagall analysis because (1) "the purposes of the banking and securities laws are quite different," and (2) some instruments, for example, bankers' acceptances, are securities for purposes of the securities laws but "plainly do not constitute securities under the Glass-Steagall Act." 104 S. Ct. at 2999-3000 (O'Connor, J., dissenting). Nothing in the majority opinion contradicts these specific points; the Court, rather, divided over the clarity of congressional intent as to commercial paper's falling within the statutory terms "note" or "security." *See infra* n.9.

8. Indeed, the *Becker* dissent explicitly stated that it does not. *Id.* at 2994.

9. Although the *Becker* opinion stated that the "ordinary meaning of the terms 'security' and 'note' as used by the 1933 Congress encompasses commercial paper," 104 S. Ct. at 2987, the Court did not articulate any broad definition of the term "security." Rather, it relied upon the plain meaning of the *statutory* definition which, as we have seen, clearly encompasses "notes," and hence commercial paper. *See* 104 S. Ct. at 2986-88.

moreover, the term may include other financial interests that are functionally equivalent to these traditional kinds of securities. But, as we have also seen, the term cannot be interpreted to include *all* financial interests in assets or in a business venture, lest traditional common trust funds be rendered invalid. Although interests in Citibank's Trust share some of the features of traditional mutual fund shares—for example, they permit diversification of risk and can be widely marketed—they are, as we have seen, quite different from traditional mutual fund shares in several important respects. Obviously, interests in IRA trust funds did not exist in 1933 when Congress passed Glass-Steagall; the term Congress employed to identify the financial instruments it had in mind, moreover, is not sufficiently precise as to clearly encompass such interests.

2

Unfortunately, the legislative history is also of limited usefulness in illuminating Congress' intent. The Institute has uncovered only two relevant aspects of Glass-Steagall's legislative history, both of which have been discussed in prior Supreme Court decisions.

The first is that, as noted in *Camp,* the Glass-Steagall Act was in part the product of Congressional investigations into the activities of bank security affiliates, including their operation of investment trusts. *See* 401 U.S. at 635. The Court reasoned that, "[s]ince Congress generally intended to divorce commercial banking from the kinds of activities in which bank security affiliates engaged, there is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust." *Id.* (footnote omitted).

Camp did not, however, hold that the term "security" includes interests in any kind of fund consisting of pooled assets. It held, rather, that Congress intended to prohibit the kind of investment fund at issue there, which the Court believed was nearly identical to the investment funds operated by bank security affiliates in the pre-Depression era. IRA trusts, with all the limitations imposed

by ERISA, did not exist, of course, in 1933. More to the point, as we have already discussed, Citibank's Trust is much less like a traditional mutual fund than was the investment fund at issue in *Camp*. We are not persuaded that Congress' concern with the activities of banks' securities affiliates would extend to the kinds of ERISA-related activities at issue here.

The second potentially relevant aspect of legislative history is the fact, noted in *Becker*, that in drafting the Glass-Steagall Act Congress rejected a regulatory approach in favor of a set of "flat prohibitions," thereby evincing a desire to "separat[e] as completely as possible commercial from investment banking." 104 S. Ct. at 2985. The Institute seems to interpret this as an indication that national banks should be prohibited from intruding onto what the securities industry considers its own turf. The Institute reasons that since many mutual funds have been offering their own IRA trusts, *see* Institute Brief at 10 n.16, prohibiting Citibank's entry into the field would be in keeping with Congress' apparent desire to keep commercial banking separated as much as possible from investment banking.

The problem with this argument, however, is that it is not entirely clear who is intruding onto whose turf. It is true, as we have already observed, that Citibank's fund represents something of a departure from the traditional role of a commercial bank in that it allows small account holders to benefit from the diversification that was previously available only to relatively large customers of the bank's trust department. But operation of an IRA trust by a mutual fund, which necessarily puts the mutual fund in the position of serving as trustee of its customers' money, also would seem to represent something of an intrusion into the traditional domain of commercial banking. Citibank's Trust, then, like the IRA trust offered by mutual funds, falls somewhere between the traditional activities of commercial and investment banking.

B

Having concluded that Congress has not "spoken to the precise question" before us, we must determine whether the Comptroller's interpretation of the Glass-Steagall Act is reasonable. Although the Supreme Court has provided limited specific guidance on how a court is to go about making such a determination, we can discern in *Chevron* and other Supreme Court decisions some general principles to guide us.

The overriding principle is that as long as Congress has no clearly discernible intent on the point in question, it is the agency which is vested with primary responsibility for interpreting the statute. *Chevron* teaches that Congress may delegate interpretative authority implicitly—by failing to legislate in sufficient detail as to resolve a particular question of interpretation—or explicitly—by expressly leaving a gap for the agency to fill. *See* 104 S. Ct. at 2782. In either case, interpretative authority has been delegated to the agency, not to the court.[10]

This broad principle has two corollaries. First, an agency interpretation may be reasonable even if it is one which the court would not have rendered had it been interpreting the statute in the first instance. 104 S. Ct. at 2782 n.11; *Chemical Manufacturers, supra,* 105 S. Ct. at 1108. Obviously, the court must not simply "rubber stamp" the agency interpretation or transform deference into "judicial inertia." *See Bureau of Alcohol, Tobacco, and Firearms v. FLRA, supra,* 464 U.S. at 96-97. But

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10. The judiciary must, of course, determine whether such a delegation has occurred. As this court recently stated:

> [P]roperly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation.

State of Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984) (emphasis in original) (citations omitted). In this sense, then, interpretation of a statute remains "quintessentially a judicial function." *See Bureau of Alcohol, Tobacco and Firearms v. FLRA,* 464 U.S. 89, 98 n.8 (1983). But this interpretative responsibility is discharged once the court has completed the initial phase of the *Chevron* analysis.

the reviewing court may not simply substitute its own reading for that of the agency.

Second, an agency interpretation may not be branded as unreasonable simply because the court doubts the wisdom of the policy choice embodied in the agency's interpretation. *Chevron*, 104 S. Ct. at 2793. It is true, as the Institute points out, that a court must reject administrative interpretations that "frustrate the policy Congress sought to implement." *Becker*, 104 S. Ct. at 2983 (quoting *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981)). But to be true to *Chevron*, a court can lawfully overturn an agency interpretation on this ground only if the Congressional policy is sufficiently clear, and the agency's interpretation so inconsistent with that policy, that the court can conclude that Congress' clear intent has been violated. Absent a violation of clear Congressional intent, it is for the agency, not the reviewing court, "to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved." *Chevron*, 104 S. Ct. at 2793.

C

With these principles in mind, we turn in the final phase of our analysis to an examination of the Institute's attack on the reasonableness of the Comptroller's interpretation. We observe first that the Comptroller, in determining whether ownership interests in Citibank's Trust constitute "securities" for Glass-Steagall purposes, employed the analytical framework fashioned by the Supreme Court in *Camp*. The Comptroller first analyzed the transaction to determine whether Citibank would be receiving funds for a true fiduciary purpose; he then examined the transaction in light of each of the Congressional concerns identified in *Camp*. *See* Ruling at 8-11. On the basis of that analysis, the Comptroller concluded that the units of participation are not "securities" and that the Act's prohibitions are therefore inapplicable. Since the Comptroller's analytical framework was the

very one employed in *Camp*, we find that framework, needless to say, eminently reasonable.

The Institute, however, challenges the Comptroller's application of this framework. It first contends that the Comptroller erroneously found Citibank's Trust to have a *bona fide* fiduciary purpose. Second, according to the Institute, the Comptroller erroneously concluded either that the Trust did not raise the Congressional concerns identified in *Camp* or, alternatively, that he could adequately address those concerns through the exercise of his regulatory powers.

1

The Institute advances two distinct reasons why it believes Citibank's Trust represents an investment rather than a fiduciary service. First, according to the Institute, the Comptroller granted an exemption to his own "fiduciary regulations," allowing Citibank to vest management of the fund in an independent supervisory committee. According to those regulations, a common trust fund must be under the "exclusive management" of the sponsoring bank. *See* 12 CFR § 9.18(12) (1984).

To be sure, the existence of a non-bank supervisory committee renders the Trust at issue here more akin to a traditional mutual fund.[11] Yet the regulations at issue merely prescribe standards or requirements for collective investments by national banks; they do not purport to define when a particular service will be deemed "fiduciary" in nature. More fundamentally, vesting control over the Trust in an independent supervisory committee does not dilute the legal effects of the bank's fiduciary obligations to its IRA customers. This arrangement might make it more difficult for Citibank to discharge its trusteeship obligations, and Citibank's delegation of control might conceivably be alleged

11. We note again that Citibank's Trust is directed by a non-bank supervisory committee only because, according to Citibank, it is required to do so by virtue of the SEC's interpretation of federal securities laws. Citibank also contends, as already pointed out, that it complied with the SEC's requirement only to avoid a protracted legal battle with that agency, a not uncommon tactic in the arena of securities regulation.

under some circumstances in this litigious age to constitute a breach of its fiduciary obligations. But the relationship between the bank, as trustee, and the IRA-holder, as beneficiary of the trust, remains intact. This feature, we are satisfied, does not take the Citibank Fund out of the domain of "fiduciary" services and propel it into the mutual fund business.

Second, the Institute points out that Citibank is not merely commingling assets of pre-existing trusts, but is actively marketing its Trust to the public as an investment. According to the Institute's interpretation of a 1940 Federal Reserve Board regulation cited in *Camp*, this aggressive marketing campaign disqualifies the Trust as a *bona fide* fiduciary service. *See* 26 Fed. Reserve Bull. 393, 394 (1940).

We agree with the Institute that, in light of *Camp's* concern with "promotional pressures," *see* 401 U.S. at 630-38, Citibank's marketing strategy might provide one indication that its Trust falls on the wrong side of the line between investments and *bona fide* fiduciary services. We cannot agree, however, that this consideration is dispositive in this case. The passages of the 1940 regulation in which the Institute relies were not themselves quoted or cited in *Camp*, and we have discerned no indication that the Supreme Court intended to elevate this regulation to the status of binding precedent. Quite apart from the regulation itself, the Comptroller carefully considered each of the promotional pressures that Citibank's marketing strategy might arguably create, and concluded that in this case those pressures are not sufficiently strong to warrant concern. *See* J.A. at 138-84. This evaluation seems to us eminently reasonable.

Finally, we do not believe that Citibank's characterization of the Trust as an "investment opportunity" should bear on whether the Trust constitutes a *bona fide* fiduciary service. The two terms are not mutually exclusive. Any fiduciary service is also an investment opportunity if by that one means an opportunity to earn a return on one's money; very few customers would likely be satisfied with the services of a bank's trust department if the bank

did no more than safekeep their funds. We agree with the Comptroller that the proper inquiry is whether the bank is offering a genuine fiduciary service in addition to an opportunity to earn a return. Banks can appropriately provide more than vaults and safety deposit boxes and still remain faithful to the demands of federal law.

In sum, we cannot say that the Comptroller unreasonably determined that Citibank's Trust represents a *bona fide* fiduciary service. Not only is the Comptroller much better situated than we are to make such determinations, but his thorough justification of his conclusion is quite reasonable.

2

The Institute contests the Comptroller's treatment of the potential economic hazards of Citibank's Trust on a number of grounds. It first advances an argument which it successfully asserted in the California litigation, *see* 593 F. Supp. at 856, namely that the Comptroller's findings exhibit a disagreement with Congress and the Court in *Camp* about the potential dangers of entry by commercial banks into the investment banking business. *See* Institute Brief at 21-22. In our view, this is not a fair reading of the Comptroller's opinion. Rather, that opinion reflects a belief that this particular arrangement does not raise the concerns identified in *Camp*, and that the arrangement is therefore not the kind of activity Congress intended to proscribe through Glass-Steagall's prohibitions.

The Institute next argues that the Comptroller simply dismissed all of the potential dangers identified in *Camp* based upon a belief that his general regulatory power under 12 U.S.C. § 92(a) and other statutes would be sufficient to curb any abuses that might arise. Institute Brief at 22. Upon analysis, this is likewise a mischaracterization of the Comptroller's ruling. The Comptroller nowhere even mentions 12 U.S.C. § 92(a), and does not rely upon any general regulatory power in minimizing the importance of the dangers identified in *Camp*. Rather, the Comptroller points to specific, existing regulations that would

obviate some of those dangers. For example, one regulation relied upon by the Comptroller, 12 C.F.R. § 9.18(b)(8)(i) (1982), prevents Citibank from lending money to the Trust itself or to any individual participant. Fairly read, the Comptroller's decision does not run afoul of *Becker's* teaching that a bank regulator may not rely upon its general regulatory powers in order to circumvent the "broad prohibition" of the Glass-Steagall Act. *See* 104 S. Ct. at 2988.

The Institute's remaining arguments reflect, at bottom, disagreement with the Comptroller's judgment about the potential economic effects of Citibank's Trust on Citibank and on the banking industry.[12] We concede the apparent plausibility of the Institute's view. On the other hand, the Comptroller has advanced plausible reasons for his view that such concerns are misplaced in this particular instance given the entire set of circumstances before him. Any assessment of the dangers foreseen by the Institute would involve judgments about complex economic phenomena related to the banking industry. Congress has charged the Comptroller with making those judgments in the first instance. We may overturn the Comptroller's judgments only if they are unreasonable. We are unable to conclude that they are.

Affirmed.

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12. The Institute advances an additional argument unrelated to these economic effects, namely that the Comptroller's action "subverts the legislative process." *See* Institute Brief at 42-44. The Institute observes that members of the banking industry have unsuccessfully sought legislation that would explicitly permit the kind of service at issue here. Thus, according to the Institute, "the Comptroller simply and unlawfully has attempted, by administrative fiat, to 'enact' the very legislation Congress repeatedly has refused to enact. *Id.* at 17.

In our view, however, these facts do not establish that the Comptroller has in any way subverted the legislative process. Elementary principles of law teach that current legislative activity is irrelevant in determining, as we must under *Chevron*, whether Congress in 1933 expressed any clear intent with respect to the issue before us or, if it do not, whether the Comptroller's interpretation of Congress' language is reasonable. Congress, moreover, remains free to address the issue if it finds itself in disagreement with the actions of the Comptroller or the courts.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE,

Plaintiff,

v.

C.T. CONOVER, *et al.*,

Defendants.

Civil Action No. 83-0549

OPINION OF THE HON. CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

INTRODUCTION

This action for declaratory and injunctive relief challenges an October 28, 1982, final Ruling (the "Ruling") issued by the Comptrolier of the Currency (the "Comptroller") which approved a plan by Citibank, N.A., to establish a "Collective Investment Trust" for individual retirement account (IRA) trust assets exempt from taxation under the Employee Retirement Income Security Act ("ERISA"), 26 U.S.C. § 408. Plaintiff Investment Company Institute is a national association of open-ended investment companies, their investment advisors, and principal underwriters. Plaintiff claims that the Ruling allows Citibank to establish a "mutual fund" in direct contravention of the prohibitions against banks becoming involved in the sale and marketing of securities found in the Glass-Steagall Banking Act of 1933 ("Glass-Steagall"), 48 Stat. 162 (codified as amended in various sections of 12 U.S.C.), one of several depression-era pieces of legislation designed to restore and maintain public confidence in financial institutions. Defendants counter that Citibank's Common Investment Trust, as authorized by the Comptroller's Ruling, is not a prohibited mutual fund, but a common trust fund which does not violate the strictures of Glass-Steagall, and which is in any event specifically authorized by

statute in ERISA. There being no genuine issue of material fact present in this case, the parties have filed cross-motions for summary judgment.

STATUTORY AND REGULATORY BACKGROUND

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"). As part of ERISA, the Internal Revenue Code was amended to add § 408, which permits qualified individuals to deduct from taxable income up to a specified amount (currently $2,000 annually, not to exceed 100% of salary), I.R.C. § 408(a)(1). Such tax-deductable contributions and earnings on trust assets are not taxed until they are distributed or withdrawn. *Id.*, § 408(d)(1). Withdrawals are not permitted until the individual establishing the account dies or reaches the age of 59½, without a 10% tax penalty being imposed. I.R.C. § 408(f)(1). In addition, § 408(a)(2) requires that only banks and other institutions which receive specific approval of the Secretary of the Treasury may serve as trustees for IRA trust assets. These IRA trust assets may only be commingled in a common trust fund or common investment fund. I.R.C. § 408(a)(5).

In addition to the statutory framework laid out by ERISA, there is another regulatory scheme applicable to this case. 12 C.F.R. § 9.18 contains the Comptroller's regulations relating to the establishment and operation of collective trusts by national banks with trust powers. Under these regulations, a national bank acting as trustee, or in a similar capacity, may invest funds held in that capacity in a common trust fund. 12 C.F.R. § 9.18(a)(1). Similarly, 12 C.F.R. § 9.18(a)(2) permits a national bank acting in a fiduciary capacity for retirement or similar trusts exempt from federal taxation to invest collectively any funds so received. Retirement fund assets may also be invested in common trust funds. 12 C.F.R. § 9.18(b)(2).

Finally, the Glass-Steagall Act provides that national banks are forbidden to engage in the securities business. Section 16 of Glass-Steagall provides that national banks shall not underwrite

or deal in "securities or stock." 12 U.S.C. § 24 (Seventh). Section 21 of the Act in turn prohibits any person in the business of selling, underwriting or distributing "stocks, bonds, debentures, notes or other securities" from engaging "at the same time to any extent whatsoever" in the business of taking deposits, except to the extent premitted in Section 24 of the Act. 12 U.S.C. § 378(a)(1). The term "securities" is not defined anywhere in Glass-Steagall.

FACTUAL BACKGROUND

In 1982, Citibank, which serves as trustee for IRA trusts, applied to the Comptroller to establish a common trust exclusively for IRA trusts for which it is trustee. This common trust is entitled the Collective Investment Trust for Citibank IRAs ("CIT"). It establishes optional portfolios into which an individual may, by way of a written Trust Agreement with Citibank, require the bank to place his IRA trust assets. The CIT is one of several options which an IRA settlor may choose when selecting Citibank as IRA trustee. Such Trust Agreement is freely revocable subject to the penalty provided for in I.R.C. § 408. However, assets may be freely transferred between portfolios within the CIT, as well as between any of Citibank's other IRA trust options, free from penalty. The purpose of the CIT is to provide an opportunity for the individual small IRA trust to be combined with assets of many other IRA trusts to create a sum large enough to allow the kind of diversification and professional financial management which it otherwise would be unable to obtain.

The interest of each IRA trust in the CIT is expressed by "units of beneficial interest." These units are available only to IRA trusts of which Citibank is trustee and are not transferable. There is no charge for the acquisition or withdrawal of these units. Citibank acts as trustee and investment advisor of the CIT and receives a monthly fee based partly on the net value of the CIT's portfolios.

The Securities and Exchange Commission has at various times stated its opinion that the units of interest in collective funds such

as the one in issue here are securities within the meaning of the federal securities laws. Citibank, while not conceding that the Commission is correct on this point, and without raising that particular issue here, filed registration statements with the Commission to have the CIT registered as an investment company under the Investment Company Act of 1940, and to register the units of beneficial interest as securities under the 1933 Act. Citibank asserts that this was done merely to avoid a long and costly exemption proceeding before the Commission.

Citibank then sought approval of the CIT from the Office of the Comptroller. In its application, Citibank asked for a ruling that the CIT did not violate the prohibition against national banks marketing securities, found in §§ 16 and 21 of Glass-Steagall. In addition, Citibank asked to be exempted from those parts of the Comptroller's regulations which might be in conflict with those of the Investment Company Act.

THE COMPTROLLER'S RULING

On October 28, 1982 the Comptroller issued a detailed and reasoned final Ruling which approved the Citibank CIT as being lawful under 12 C.F.R. Part 9 and not in conflict with the proscriptions of Glass-Steagall. The Comptroller initially determined that the CIT was a proper exercise of Citibank's fiduciary powers under either 12 C.F.R. § 9.18(a)(1) or (a)(2). The CIT was found to fall under the former provision because the assets invested therein are received and held by Citibank in trust. The latter provision was found also to apply as the trust assets invested in the CIT are retirement plan assets. (Ruling 4-5). Next, the Comptroller found that such a collective investment of IRA trust assets was specifically authorized by ERISA. (R. 8). The Ruling went on to state the Comptroller's finding that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." (R. 9).

In so finding, the Comptroller distinguished this case from that presented in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("Camp"). In that case, the Comptroller had

approved a commercial bank's plan for the collective investment of managing agency funds not held by the bank in trust. *Id.* at 622. The Supreme Court invalidated the Comptroller's ruling, holding that such a collective investment of managing agency assets held by a national bank violated Glass-Steagall's prohibition against national banks issuing, marketing or underwriting securities. The Comptroller found that the "most significant difference" between the invalid fund in *Camp*, and the Citibank CIT was that the latter involves assets held in trust, which would render it lawful under the Supreme Court's analysis in *Camp*. (R. 10). The Comptroller found that the CIT is "the formal manifestation of a traditional banking service," i.e. trust activities, (R. 15), unlike the service offered in *Camp*. Finally, the Comptroller concluded that the hazards which the Supreme Court noted in *Camp* as being behind the necessity for the prohibitions in Glass-Steagall, were "non-existant or negligible in the context of commingled IRA trusts." (R. 12).

For the reasons set forth in discussion which follows, this Court declines to invalidate the Comptroller's Ruling. Instead, it is the opinion of this Court that the Comptroller acted reasonably when he made his Ruling. The Citibank CIT does not violate the Glass-Steagall Act in that the units of beneficial interest are not "securities" under that Act, and the same holding enunciated in *Camp*, which Glass-Steagall was intended to prevent, are simply not present in this case, the CIT presents no other violations of the Act, and, finally, the collective investment of IRA trust assets is specifically authorized by ERISA.

I). THE COMPTROLLER'S CAREFUL AND REASONED DECISION IS ENTITLED TO GREAT WEIGHT.

Plaintiff would have this Court accord little weight to the Comptroller's interpretation of Glass-Steagall. As support for this contention, plaintiff points to *Securities Industry Association v. Board of Governors*, U.S. , 104 S.Ct. 2979 (1984) ("Becker"). In that case, however, the Supreme Court, while invalidating the sale of commercial paper by a national bank as

being a "security" under Glass-Steagall, held that the Court accords "substantial deference" to an interpretation by an administrative agency charged with administering the Act "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Becker, supra* at 2983; *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In *Camp*, the Supreme Court held that this principal of according great deference to any reasonable construction of a regulatory statute by the agency charged with the statute's enforcement finds particular application to the Comptroller of the Currency in regards to the Glass-Steagall Act. *Id.* at 626-27. *NYSE v. Smith*, 404 F.Supp. 1091, 1096 (D.D.C.1975). This was reiterated in *Securities Industry Ass'n v. Board of Governors,* U.S. , 104 S.Ct. 3003, 3009 (1984), decided the same day as *Becker*. Nothing in *Becker* acts to change this principal as applied to the Comptroller. The Court finds that the Comptroller's interpretation was indeed reasonable, and will be accorded the weight it so deserves.

Plaintiff then points out the language in *Becker* which admonishes against *post hoc* rationalizations by counsel, specifically those in *Becker* involving some of the same arguments put forth by counsel in the present case. Defendant apparently would have the Court consider most, if not all, of the defendants' arguments to be *post hoc*, and therefore entitled to little or no weight. The Court is not persuaded by plaintiff's view of the holding in *Becker*. Unlike the present case, the counsel in Becker was advancing an argument not present in the agency ruling. The Supreme Court justifiably limited its consideration to only those arguments put forth in the Ruling itself. Here, there are no *post hoc* rationalizations being thrust upon this Court, merely detailed arguments raised and answered by the Comptroller in his Ruling. *See, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962). Therefore, the Court declines to ignore any of the defendants' arguments based upon the plaintiff's interpretation of *Becker*.

II). THE COMPTROLLER ACTED REASONABLY IN INTERPRETING GLASS-STEAGALL AS NOT PROHIBITING THE COLLECTIVE INVESTMENT FUND PROPOSED BY CITIBANK.

a) The "units of beneficial interest are not "securities" under Glass-Steagall.

The Comptroller's Ruling found that the units of beneficial interest in the Citibank CIT were not "securities" under the Glass-Steagall Act. Plaintiff argues that the Comptroller was in error in this interpretation. As the definition of "securities" exists nowhere in Glass-Steagall itself, the issue, as noted above, is whether the Comptroller's interpretation was reasonable in light of the purpose and intent of the statute. *Becker, supra.* Initially, plaintiff argues that since the CIT and its units of beneficial interest have been registered with the SEC, that in effect acts as an admission by Citibank that they are dealing in the marketing of securities. This argument is without merit. Although it is clear that the term "securities" is broadly enough defined by the securities laws to encompass interests in common trust funds, *See,* 15 U.S.C. § 77b(1), it is also equally clear that not all such funds are to be considered securities for Glass-Steagall purposes. *Camp, supra*, 401 U.S. at 638. The Court in *Camp* drew a distinction between trust assets received "for a true fiduciary purpose rather than for investment," *Id.*, the former being exempt from the Act. Thus, it does not necessarily follow that the mere fact of registration under the securities laws is proof that the fund or interest so registered is a security for Glass-Steagall purposes.

The distinction drawn in *Camp,* between fiduciary purpose and investment, formed the crux of the holding in *Investment Company Institute v. Conover, et al.*, No. 84-0742 (slip op. N.D. Cal. August 28, 1984) ("ICI"). In that case, plaintiff was challenging a separate but identical Ruling by the Comptroller authorizing two California banks to offer the same service involved in this case. The Northern District of California found the funds in that case to be soley for the purpose of investment and invalidated the

Comptroller's Ruling. Plaintiff would have this Court do the same here. However, this Court believes, with great respect for the careful analysis shown by the Court in *ICI*, that the conclusion there was in error. By focusing only on whether the funds in question fit into the mold of a "common trust fund," the Court in *ICI* failed to recognize that both Glass-Steagall and ERISA permit collective investment by banks of trust assets held either in "common trust funds" or "common investment funds." I.R.C. § 408(a)(5). Such "investment" of assets of statutory tax exempt retirement plans is a traditional banking function, as evidenced by the Comptroller's own long-standing regulations, 12 C.F.R. § 9.18 *et seq.*, and the legislative history of ERISA.

ERISA itself is clear on this point, allowing the commingling of IRA trust assets in either a common trust or a common investment fund. I.R.C. § 408(a)(5). Such funds have long been considered traditional banking services for retirement assets, and there is a clear indication that Congress fully intended IRA assets to be "invested" in this manner. The Conference Report on ERISA, quoted in part by the Court in *ICI*, goes on to state that "the conferees intended that, for the purposes of diversification of investments, the assets of qualified individual retirement accounts may be pooled with the assets of qualified § 401(a) trusts. . ." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 337 (1974). Thus, Congress evidenced its intention that IRA trusts were to be treated by banks in accordance with their recognized authority to collectively invest other statutory retirement plan assets. The legislative history of ERISA goes on to show Congress' explicit understanding that it is "common practice for banks . . . . to maintain pooled investment funds for [retirement] plans." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 316. Thus, it is clear that the funds invalidated by the Court in ICI, and at issue here, were considered by Congress to be a natural extension of traditional banking activities and therefore the units of beneficial interest are not "securities" in violation of Glass-Steagall.

b) Glass-Steagall does not prohibit a National Bank from establishing collective investment trusts for IRA trust assets.

As noted above, Glass-Steagall prohibits national banks from marketing, issuing, or underwriting any issue of security or stock. 12 U.S.C. § 24. Conversely, Glass-Steagall also forbids anyone "in the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatsoever in the business of receiving deposits." 12 U.S.C. § 378(a)(1). In short, banks are not to be involved in the securities field and those involved in the securities field are not to act as traditional banks. The Comptroller, using his expertise as the agency administrator responsible for the application of the Act, and in a carefully reasoned and crafted Ruling, interpreted this to mean that Glass-Steagall poses no impediment to the Citibank CIT. The Court, as discussed fully below, finds this interpretation reasonable, and will not overturn it.

Initially, the forgoing discussion relating to funds such as these being considered by Congress to be a natural extension of traditional banking functions is dispositive in and of itself. Glass-Steagall says banks must act like banks alone. Here, Congress has shown its recognition that the collective investment of IRA trust assets is to be considered the same as pooled investment of other types of retirement plans, which have always been considered to be a tradional banking function. *Camp, supra* at 638. *See also*, H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 316 (1974).

Here, Citibank is selling its fiduciary services, consistant with its authority under ERISA. There is no sale of prohibited "investments," due to the fiduciary nature of the IRA trust. *Camp*, supra at 624-25. ERISA imposes upon Citibank a set of fiduciary duties and obligations which ensure that Citibank is engaged in a proper banking and fiduciary service. Unlike the fund struck down in *Camp*, the Citibank CIT is bound by the restriction set forth in ERISA on all IRA trusts. These restrictions assure that Citibank cannot serve simply as a vehicle for

investment, as was the case in *Camp*. These restrictions, as the Comptroller noted in his Ruling, include restrictions on self-dealing of various sorts, I.R.C. § 408(a)(5); requirements of reports and accounting, I.R.C. § 408(i); and provisions which prevent a bank as trustee from causing any forfeiture of IRA trust assets. I.R.C. § 408, *et seq*. In addition, the IRA settlor himself is constrained by various statutory restrictions such as the $2,000.00 limit on tax-free investment per year. I.R.C. § 408(d), and the %10 tax penalty for withdrawal of IRA assets before reaching the age of 59½. I.R.C. § 408(f). In sum, there exists a strong statutory framework which ensures the fiduciary nature of the Citibank CIT. The Comptroller acted reasonably when he relied on this in his Ruling.

c) The "hazards" which Glass-Steagall was designed to prevent are not present in the Citibank Collective Investment Trust.

The Supreme Court in *Camp* enunciated several "hazards" which the Glass-Steagall Act was designed to prevent. Based on the purpose of the Act, the Supreme Court concluded that the managing agency account in *Camp* was replete with these very hazards and struck down the ruling. The Comptroller's Ruling distinguished the Citibank CIT from the managing agency account in *Camp*, noting that the "fiduciary services being considered here do not present the hazards and potential abuses that Congress sought to avoid when it enacted the Glass-Steagall Act." (R. 9). The Court holds that the Comptroller acted reasonably in making this finding.

In *Camp*, the Supreme Court noted that "[t]he hazards that Congress had in mind were not limited to the obvious danger that a bank might invest its own assets in frozen or otherwise imprudent stock or securities investments." *Id*. at 630. What Congress was also focusing on were some of the more "subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary . . . . and enters the investment banking business." *Id*. Included in the list of "hazards" Glass-Steagall was intended to prevent are the risk of a bank making unsound loans, to its "affiliate" or to others connected with the investment; that a

bank's "reputation for prudence and restraint" would be lent to its securities business, thus glossing over the risks inherit in such endeavors; and, finally, the risk that a bank's "promotional interest" would lead to an inability to give its customers sound and impartial financial advice. *Id.* at 630-32. Finding these very dangers present in the managing agency account, the Supreme Court declared it invalid.

In the present case, however, the situation is quite different than in *Camp*. The Court agrees with the Comptroller's ruling that the dangers found in *Camp*, which Glass-Steagall was designed to prevent, are simply not present in this kind of collective IRA trust asset fund. Initially, there is no danger of misuse of a bank's lending power to support speculative securities activity. Citibank cannot lend money to its CIT. 12 C.F.R. § 9.18(b)(8)(i). Further, the Comptroller's regulations and ERISA itself preclude Citibank from making a loan to an individual holder of a unit of beneficial interest in the fund. 12 C.F.R. § 9.18(b)(8)(i), I.R.C. § 408(a)(4). Finally, as the Comptroller found, it is "implausible" that Citibank would put its own assets at risk by making unsound loans to companies whose securities the CIT owns. The entire structure of the fund is towards diversification. Any such loans would only minimally affect the value of the fund itself.

Secondly, there is no danger of the bank using its reputation to hide the dangers involved with the securities market. As noted above, this is a fiduciary relationship involving tightly regulated and statutorily restricted IRA trust assets. The safeguards built into ERISA itself act so as to protect the IRA account holder in a way the ordinary securities investor could never be protected. The IRA account holder knows that his money is protected. This is precisely why he has opened such an account. The securities investor, on the other hand, ought to be aware of the risk he is taking and so ought not to be in a position to be fooled into thinking his money is just as safe as if deposited. That is one of the purposes behind Glass-Steagall, but it simply is not present here.

Third, and finally, the "promotional interests" hazard is also "non-existant or negligible." (R. 9). It is the IRA settlor who directs, in writing, which of several available IRA investment options his trust assets are to be placed into. (R. 3). The CIT is only one of many choices. The bank has no "salesman's stake" in selling units in the CIT. What it is selling is its services an an IRA trustee in general. Moreover, Citibank imposes no sales charge or commission to IRA trusts to acquire units in the CIT. (R. 12). The Court agrees with the Comptroller's finding that this creates no greater or different risks "than when a bank engages in its customary fiduciary functions." (R. 13). There exists further no greater risk to the bank's solvency, good name and good will should the CIT fail than if a traditional fiduciary trust were to likewise fare badly. (R. 12). For all these reasons, the Comptroller was correct and acted reasonably when he ruled that the Citibank CIT involved none of the Glass-Steagall hazards enumerated in *Camp*.

d) The fact that the Citibank Collective Investment Fund is advertised does not make it illegal under the Glass-Steagall Act.

Plaintiff makes much of the fact that Citibank has aggressively advertised the Collective Investment Fund to the public. Plaintiff argues that this is a prohibited act of "marketing" under Glass-Steagall, and shows further that the fund involves "securities" under that Act. The Court, however, finds this argument to be strained at best, and completely inaccurate.

Without repeating the analysis gone through above, the Court reiterates that the units of beneficial interest in the Citibank CIT are not "securities" under the Glass-Steagall Act regardless of their being "mass-marketed." Citibank is not advertising the CIT itself. Rather, Citibank is marketing its entire IRA trust service. The advertising of the CIT is used to attract customers to utilize Citibank as their IRA trustee. There is nothing improper about a bank advertising its various services to the public. *Franklin National Bank v. New York*, 347 U.S. 373 (1953). *See also, NYSE v. Smith*, 404 F.Supp. 1091, 1097 (D.D.C. 1975), *vacated on other grounds sub nom., NYSE v.*

Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

Moreover, there is nothing in ERISA, Glass-Steagall or any other statute which prohibits the marketing of a bank's IRA trust services by way of its advertising its collective investment fund for IRA accounts. The only limitation on advertising any common trust is inapplicable to the Citibank CIT since it is a fund consisting solely of tax exempt retirement assets. 12 C.F.R. § 9.18(a)(1), (2); (b)(5)(v).

Finally, to find that the advertising of such IRA trust services was in violation of Glass-Steagall would be to totally frustrate the purpose of ERISA. Congress was concerned with encouraging retirement savings. In order to fulfill its mission as a means of reaching such a goal, an IRA account service must be advertised to the general public. Only by the type of "mass-marketing" which plaintiff complains of here will the general public be aware of the opportunities available for beneficial methods of preparing for one's retirement.

CONCLUSION

For all the reasons above, the Court concludes that the Comptroller acted reasonably when he made his Ruling approving the Citibank Collective Investment Trust for IRA trust assets. There being no genuine issue of material fact in dispute, the Court, by Order of even date herewith, denies plaintiff's motion for summary judgment, and grants the defendants' motions for summary judgment to the extent hereinbefore stated.

/s/ CHARLES R. RITCHEY

CHARLES R. RICHEY
United States District Judge

Date: November 8, 1984

[Reprinted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE, *Plaintiff.*	
v.	Civil Action No. 83-0549
C.T. CONOVER, ET AL., *Defendants.*	

ORDER

In accordance with the Opinion of even date herewith, it is by the Court, this 8th day of November, 1984, hereby

ORDERED that defendants' motions for summary judgment be and hereby are granted to the extent consistant with the opinion hereinbefore stated in the Opinion of even date herewith, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and the same is hereby denied, and it is

FURTHER ORDERED that this case will stand dismissed, and the clerk shall remove it from the docket of the Court.

/s/ CHARLES R. RICHEY

CHARLES R. RICHEY
United States District Judge

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY CITIBANK, N.A., PURSUANT TO 12 C.F.R. § 9.18(c)(5) TO ESTABLISH COMMON TRUST FUNDS FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST EXEMPT FROM TAXATION UNDER SECTION 408 OF THE INTERNAL REVENUE CODE OF 1954.

DECISION

Background

Citibank, N.A., ("Bank") proposes to establish common trust funds for the collective investment of individual retirement account trusts ("IRA trusts") which are exempt from taxation under Section 408 of the Internal Revenue Code of 1954 ("I.R.C."). The Bank would act as trustee of the individual IRAs and, as trustee, would be directed to invest the IRA trust assets in a common trust fund or funds maintained by the Bank. It intends to register the funds with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940 ("Investment Company Act") and to register the offering of interests in the funds under the Securities Act of 1933 ("Securities Act"). The Bank would, as trustee, perform the functions of investment adviser, administrator, custodian and transfer agent of the fund pursuant to an agreement with them and comply with all applicable provisions of the Securities Act and the Investment Company Act. It is because some requirements of these laws might arguably conflict with certain provisions of 12 C.F.R. § 9.18(b) generally applicable to bank collective investment funds that the Bank is requesting that the Office, pursuant to 12 C.F.R. § 9.18(c)(5), waive the applicability of the provisions of 12 C.F.R. § 9.18(b) to the extent necessary to permit compliance with the Securities Act and the Investment Company Act.

Power of National Bank to Collectively Invest IRA Trust Assets

The regulations of this Office relating to the collective investment of trust funds, 12 C.F.R. § 9.18, permit IRA trust assets to be collectively invested by national banks acting as fiduciaries. The regulations generally establish two situations in which it is permissible to collectively invest funds: (i) under 12 C.F.R. § 9.18(a)(1), a bank acting as trustee or in a similar fiduciary capacity may invest the funds held in that capacity in a common trust fund; and (ii) under 12 C.F.R. § 9.18(a)(2), a bank as fiduciary may invest in a fund consisting solely of assets of retirement or similar trusts exempt from federal income taxation. Retirement fund assets are not precluded from investment in a common trust fund. 12 C.F.R. § 9.18(b)(2). As discussed below, it is readily apparent that a national bank receiving IRA trust assets does so in the capacity of trustee; it is also obvious that IRA trusts are retirement plans exempt from federal income tax. Thus, IRA trust assets may, pursuant to the Comptroller's regulations, be commingled in either a § 9.18(a)(1) or 9.18(a)(2) fund.

The power of a national bank acting as trustee for IRA trusts to commingle the trust assets was confirmed in the Employee Retirement Income Security Act of 1974 ("ERISA") and in its legislative history. It was ERISA that essentially created the concept of IRAs by providing special tax treatment for retirement trusts established by persons not covered by employer-sponsored qualified retirement plans.

The term "individual retirement account" is defined as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a "written governing instrument" meeting certain requirements. I.R.C. § 408(a). (Custodial and annuity accounts are covered by special provisions not relevant here.) One of the requirements is that the trustee be a bank or some other party able to demonstrate to the satisfaction of the Secretary of the Treasury its ability to meet similar fiduciary standards. I.R.C. § 408(a)(2). Another

requirement is that the assets not be permitted to be commingled "except in a common trust fund or common investment fund." I.R.C. § 408(a)(5). The power to further commingle the assets of IRA trusts in a fund containing assets of plans exempt from taxation under I.R.C. § 401(a) is conferred by I.R.C. § 408(e)(6). The House Report clearly indicates the Congressional understanding about the nature of IRA trusts.

> [A]n individual retirement account generally is to be a *domestic trust* created or organized by a written instrument for the exclusive benefit of an individual or his beneficiaries. . . . The balance in an individual retirement account generally may be invested in any assets that are acceptable investments for a qualified plan. . . . However, account assets generally are not to be commingled with other property except *in a common trust fund*. . . . Under the governing instrument, *the trustee of an individual retirement account generally is to be a bank.*

H. R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 4797-98 (emphasis added). While the House bill was not the version ultimately adopted, its provisions relating to individual retirement accounts were not materially altered in the final version. Thus, the Conference Report notes:

> Under the conference substitute, the assets of an individual retirement account *may be invested in a trusteed* or custodial *account with a bank,* savings and loan, or credit union, or in an annuity or in a qualified retirement bond. . . . [T]he assets of an individual retirement account may not be commingled with other property, except *in a common trust fund*. . . . [T]his legislation . . . is not to limit in any way the application of the Federal securities laws to individual retirement accounts *or the application to them of the laws relating to common trusts* or investment funds maintained by any institution.

H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5116-17 (emphasis added). The Conference Report did expand the

investment choices available to persons establishing individual retirement accounts by permitting the use of custodial accounts, annuity contracts, and qualified bonds. But what is significant here is that it continued the authorization for the use of trust accounts with bank trustees authorized to commingle the funds in common trust funds subject to all laws generally applicable to common trust funds. Accordingly, the overwhelming conclusion to be drawn from ERISA and its legislative history is that Congress believed it to be within the power of banks to serve as trustees for IRA trusts and to collectively invest the assets of these trusts in common trust funds or in collective investment funds for retirement plan assets.

Glass-Steagall Act Consideration

Having determined that collectively investing the assets of IRA trusts is a permissible trust service sanctioned by statute and the Comptroller's regulations, it is necessary to determine whether sections 16, 20, 21 or 32 of the Banking Act of 1933 (12 U.S.C. §§ 24 (Seventh), 377, 378 and 78, respectively) (commonly referred to collectively as the "Glass-Steagall Act") impose any impediment to a bank offering these fiduciary services.

We have concluded that there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets. Among other things, the decision of the Supreme Court in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) (*"ICI v. Camp"*) supports the conclusion that the prohibitions of the Glass-Steagall Act do not apply to a bank's collectively investing IRA trust assets in the manner proposed here. As discussed below, *ICI v. Camp* recognized that banks have traditionally commingled trust assets, thereby distinguishing the offering of such fiduciary services from the commingled agency account in that case. Furthermore, the fiduciary services being considered here do not present the hazards and potential abuses which Congress sought to avoid when it enacted the Glass-Steagall Act.

In *ICI v. Camp*, the Supreme Court held that the marketing and sale of securities representing interests in collectively invested

assets held by a national bank in managing agency accounts violated the Glass-Steagall Act. Certain general similarities may be seen between the fund in that case and the proposed collective investment of IRA trust assets considered here. In particular, the plan in each instance involves a fund which would be registered under the Investment Company Act and interests in such fund which would be registered as securities under the Securities Act. In addition, each plan involves the collective investment of participants' assets in a fund maintained for the benefit of the participants, as opposed to third-party beneficiaries. But the similarities end there. The differences between the two plans are highly significant in terms of analysis of the applicability of the Glass-Steagall Act. The most significant difference is that the commingling of managing agency accounts discussed in *ICI v. Camp* did not involve the receipt by the bank of assets in trust. Rather, the assets were received in a managing agent capacity. 401 U.S. at 622 n.8. The Court noted that serving as a managing agent was a legitimate fiduciary function for bank trust departments but went on to find that the collective investment of the assets of those accounts, when marketed to the general public as investment vehicles registered pursuant to the federal securities laws, violated the prohibitions in sections 16 and 21 of the Glass-Steagall Act, relating to underwriting, issuing, selling and distributing securities. In its discussion, however, the Court noted that "[f]or at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." 401 U.S. at 624. Since the IRA assets in the present case will be received by the Bank as trustee, in both a common-law sense and within the meaning of ERISA, the collective investment of IRA trust assets (and marketing of such fiduciary services to the extent allowable under applicable laws and regulations) is clearly sanctioned by the statement of the Court in *ICI v. Camp*.

The analysis under the Glass-Steagall Act requires further consideration in this case, however, in light of the fact that the IRA trusts (and participations in the fund) will be offered as

"securities" registered pursuant to the Securities Act. The Court's conclusion in *ICI v. Camp* was that the issuance and sale of securities by a bank violated the Glass-Steagall Act where the securities represented a nontraditional banking service and where, in the Court's view, certain potential abuses that Congress sought to avoid by the enactment of the Glass-Steagall Act were present. This Office has viewed the meaning of the term "securities" under the securities laws as not necessarily synonomous with its meaning under the Glass-Steagall Act. In particular, when, as in the present case, the "securities" merely represent the formal manifestation of a traditional banking service, it is the Office's opinion that the prohibitions of the Glass-Steagall Act are not applicable. Nevertheless, since the Bank's fiduciary service will be offered in this manner, it may be appropriate to assess the transaction in terms of the hazards and potential abuses identified by the Court in *ICI v. Camp.*

The Court indicated that Congress was concerned primarily with promotional pressures and certain attendant hazards and potential abuses arising from the investment banking business. In particular, these abuses involved (1) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (2) the temptation to support the securities firm with unsound loans; (3) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (4) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (5) the interference by the bank's securities business with its ability to provide disinterested investment advice. 401 U.S. at 630-33. Each of the enumerated potential abuses is nonexistent or negligible in the context of commingled IRA trusts.

For example, the Bank's reputation could conceivably be affected in some measure by the performance of its IRA trust fund, but in view of the absence of any current adverse effects on the reputation of banks arising from their significant involvement

in the collective investment of pension fund assets, it is difficult to treat this as a real concern. The concerns relating to pressures to make improvident loans are similarly misplaced. The Bank would be barred by I.R.C. § 4975 from lending to the trust. And in light of the annual contributions limitations for investment in IRA trusts, it is unlikely that the Bank would be lending to the fund participants for this purpose. Finally, in the case of a highly diversified fund, it seems implausible that the Bank would be tempted to lend to any issuer whose securities are held by the fund merely to support the fund. The insulation of the trust department from confidential information obtained in the commercial lending business further reduces the likelihood of this hazard. *Cf.* 12 C.F.R. § 9.7(d). And with regard to providing investment advice, the same rationale concerning diversification of investment makes it implausible that the Bank would be tempted to render anything but disinterested advice. In any event, the potential for conflicts of interest and other abuses cited in *ICI v. Camp* are not any more present when a bank administers collectively invested IRA trust assets than when a bank engages in its customary fiduciary functions. Accordingly, because the potential for abuse is nonexistent or negligible here, and because this is essentially a traditional banking service, it would be inappropriate to conclude that there is any security here for purposes of the Glass-Steagall Act.

Considerations Relating to the Federal Securities Laws

A review of the current treatment accorded collectively invested IRA trust assets under the federal securities laws is instructive, particularly where, as apparently is the case here, a bank in an abundance of caution elects registration under the Investment Company Act and the Securities Act rather than pursuing exemptions which are available to bank common trust funds and collective investment funds for tax-exempt pension plans, as well as the interests in such funds. Among other things, it underscores the essential similarities between collectively

invested IRA trust assets and traditional banking services exempt under those Acts.

The SEC has, in a series of interpretive letters, generally maintained that no exemption from registration under the Securities Act and the Investment Company Act is available where a bank seeks to collectively invest IRA trust assets as proposed here. *See* Continental Bank of Norristown, Pa. (pub. avail. Sep. 2, 1982); United Missouri Bank of Kansas City, N.A. (pub. avail. Dec. 31, 1981); Owensboro National Bank (pub. avail. July 29, 1981); Citytrust (pub. avail. Mar. 9, 1980); The Millikin National Bank of Decatur (pub. avail. April 1, 1979); Continental Illinois National Bank and Trust Co. of Chicago (pub. avail. April 28, 1975). *See also,* SEC Release No. 33-6188 (Feb. 1, 1980). This position has been asserted despite two exemptions under each Act that arguably should apply: the exemption for common trust funds maintained by banks and the exemption for collective investment funds of certain tax-exempt pension plans. 15 U.S.C. § 77c(a)(2); 15 U.S.C. § 80a-3(c)(3) and (11). Because of the SEC's unwavering position in this regard, the Bank has determined that it should register its fund and the participating IRA trusts under the securities laws.

With respect to the common trust fund exemption, the SEC has steadfastly maintained that it is available only for participation in funds maintained by a bank for "bona fide fiduciary purposes." The SEC contrasts with this the notion of public investment vehicles. For support, the SEC cites the legislative history of the Investment Company Act Amendments of 1970 ("1970 Amendments") in which both houses of Congress stated that the exemption applies to "traditional common trust funds maintained by banks as investment vehicles for the assets held by the bank in a bona fide fiduciary capacity. . . . [I]t would not exempt interests or participations in bank funds maintained as vehicles for direct investment by individual members of the public." *H.R. Rep. No.* 1382, 91st Cong., 2nd Sess. 43 (1970); *S. Rep. No.* 184, 91st Cong., 1st Sess. 27 (1969). The problem with the SEC's reliance here is twofold. First, as discussed above, the Bank is

accepting IRA trusts in a traditional, bona fide fiduciary capacity —*i.e.*, as trustee. Second, the fund is not a vehicle maintained for "direct investment" by the public but is, instead, an investment vehicle for the Bank as trustee of IRA trusts, precisely the thing contemplated as exempt in the reports cited above. *Cf. International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 565 (1979).

The *bona fides* of the fiduciary relationship can easily be seen from the purpose of establishing or augmenting an IRA trust. The participant is not seeking short-term investment profit but, instead, is seeking preservation and management of assets that will be available only to the participant when the participant reaches age 59½, or to the participant's beneficiaries in the event of death, unless the participant is willing to incur substantial tax penalties. Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death.

The other exemption often cited in this context covers certain tax-exempt pension interests. The SEC has repeatedly denied the availability of this exemption on the grounds that it applies to interests in funds for pension plans exempt from taxation under I.R.C. § 401, whereas IRA trusts are exempt from taxation under I.R.C. § 408, an assertion that clearly is true on the face of the statute. In this regard the SEC cites the legislative history of ERISA referred to above and certain language in a 1975 Study Outline prepared by a Senate subcommitee. The legislative history of ERISA does include the statement that the "legislation . . . is not to limit in any way the application of the Federal securities laws to individual retirement accounts," but there is no indication that the conference committee meant this to include the registration requirements of the Securities Act or the Investment Company Act. Rather, the conference committee could have intended only that the antifraud provisions of the securities laws would be applicable or, more likely, that they were not expressing any view as to the applicability of the securities laws. Yet another interpretation could be that the committee intended the securities laws to be applicable if the pension fund or common

trust fund exemption was not available—*i.e.*, if the trustee was not a bank. In any event, the rather cryptic sentence is capable of multiple interpretations that would not preclude the availability of the various exemptions. A more direct statement cited by the SEC is contained in a 1975 Study Outline on The Securities Activities of Commercial Banks prepared by the Subcommittee on Securities of the Senate Banking, Housing and Urban Affairs Committee. The Outline, at 13, notes that "because IRA's are not trusts described in Section 401 of the Code, IRA's and collective investment funds for IRA's clearly are not exempt from registration under the Investment Company Act of 1940 and the Securities Act of 1933." The statement does support the SEC's view. However, it was not made in the context of any legislative action; it was not made contemporaneously with the passage of ERISA; it was not made by the Senate Committee responsible for ERISA; it was not even made by a full Senate committee. What is more significant is that it was really only a tentative view expressed by the subcommittee, since in soliciting comments the Outline specifically had asked, among other things, "3. Are banks precluded from investing IRA assets in any collective fund unless it is registered under the Investment Company Act of 1940? Under the Securities Act of 1933?" *Id.* at 14.

Further, the subcommittee reprinted lengthy materials submitted by Messrs. Mayer, Brown & Platt as counsel to Continental Illinois National Bank and Trust Company of Chicago (Continental). The Continental materials are instructive in several respects. They contain counsel's analysis of why the § 401 plan exemption should be applicable and the SEC's rejection of that argument. With regard to the Investment Company Act, counsel noted that the 1970 Amendments, providing an exemption for § 401 plans, merely restated the SEC's interpretive position that, even in the absence of specific statutory language, tax-exempt pension trusts were not required to be registered as investment companies. The 1970 legislation codified this prior to the creation of tax-exempt IRA trusts in 1974. The fact that Congress granted the tax exemption under new I.R.C. § 408 should not

have altered the Investment Company Act exemption. A similar view of the scope of roughly comparable amendments in 1970 to the Securities Act of 1933 was enunciated by the Court in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 564-65 (1979). The § 401 plan exemption was created, in the Court's view, so that pension plans purchasing excess amounts of employer securities *"and only such plans"* were required to be registered. 439 U.S. at 565 n.19 (emphasis added).

Continental also urged the notion that the fact that I.R.C. § 408 gave the tax exemption to IRA trusts was not a conscious decision on the part of Congress vis-a-vis the securities laws. Rather, it was a drafting technique related to other technical problems in ERISA. The Senate bill on ERISA would, in fact, have deemed IRAs to be I.R.C. § 401 plans for certain cited purposes, such as the excise tax provisions of I.R.C. § 4975, but would have exempted them from certain other cited provisions applicable to qualified pension plans, such as the funding rules. The House bill ultimately used as the vehicle for ERISA adopted a different drafting technique, putting IRAs in a separate new Code section and spelling out the rules applicable to IRA trusts in that section. The SEC found these and other reasons unpersuasive and refused to grant Continental a no-action position, relying instead on the "plain language" of the exemptions.

The requirement of registration of IRA trusts or collective investment funds for them was further called into doubt by the Supreme Court's decision in the *Daniel* case referred to above. In that case the Court held that an employee's interest in a noncontributory pension plan was not even a security for the purposes of the federal securities laws. Several subsequent cases have extended this view to contributory plans. *See* Cunha v. Ward Foods, Inc., Civ. No. (D.Ha., June 21, 1982) (mandatory employee contributions); *O'Neil v. Marriott Corp.*, Civ. No. (D. Md. May 11, 1982) (voluntary employee contributions); *Tanuggi v. Grolier, Inc.*, 471 F. Supp. 1209 (S.D.N.Y. 1979) (mandatory employee contributions); *Newkirk v. General Electric Co.*, 20 F.E.P. Cases 1588 (N.D.

Cal. 1979) (noncompulsory contributions by employees). The SEC apparently has not been pursuaded by these lower court cases. *See* SEC Release No. 33-6188 (1980). The rationale in each case is that the protections of the securities laws are not needed, nor on their face mandated, for pension interests adequately safeguarded by other regulatory schemes. The same rationale would appear to apply here, although it is not a basis for our decision. For example, the Comptroller's rules in 12 C.F.R. Part 9, together with common law fiduciary principles, would appear to provide an adequate substitute for the securities laws in protecting participants' interests. Further, the rules on prohibited transactions contained in ERISA apply to IRA trusts and funds for their collective investment. Finally, while the fiduciary standards of Title I of ERISA are not applicable to collective investment funds containing IRA trusts only, they would apply to collective investment funds for IRA and other retirement plan assets, a type of commingling expressly contemplated by the legislative history of ERISA.

The Bank's Ruling Request

The Bank has requested, pursuant to 12 C.F.R. § 9.18(c)(5), a waiver of the applicability of those provisions of 12 C.F.R. § 9.18(b) that might be inconsistent with provisions of the Securities Act and the Investment Company Act. In particular, the only provision of 12 C.F.R. § 9.18 identified as creating a conflict is the requirement, in § 9.18(b)(12), that the Bank maintain exclusive management of collective investment funds it administers. It is not clear that this provision of § 9.18 will be violated, since, among other things, the Bank will serve at the outset as the investment adviser to the collective fund. Nevertheless, it could be argued that the Bank will not be in compliance with the "exclusive management" requirement because of requirements in the Investment Company Act that a majority of the board or committee of directors of the fund be independent and that the

board and the participants have the power to replace the investment adviser. Other provisions identified by Bank counsel, relating to fees, advertising, and evidence of ownership, do not create any apparent conflict.

We note that the SEC, pursuant to Section 6(c) of the Investment Company Act, 15 U.S.C. § 80a-6(c), may waive provisions of the Act, such as the independent board requirement of Section 10, 15 U.S.C. § 80a-10, provided it is consistent with the investor protection provisions of the Act. The SEC has, in the past, granted limited waivers to banks from the provisions of Section 10. The Bank has indicated that it prefers not to seek similar waivers from the SEC in this instance based on communications with SEC staff indicating that, among other things, the waiver process could be protracted and, quite probably, would involve extended public hearings, and further based on the bank's marketing surveys indicating the importance of offering its trust services to the public piror to year-end 1982.

Conclusion

The Office has carefully considered the legality of the activities proposed by the Bank. For the reasons presented above, it is my opinion that the Bank may offer this fiduciary service, even if registration is effected under the Investment Company Act and the Securities Act. Accordingly, on the basis of this legal analysis and our consideration of other relevant information presented by the bank, the application is approved this day.

/S/ C.T. CONOVER

C.T. CONOVER
Comptroller of the Currency

Dated: 10/21/82

[Reprinted]

Comptroller of the Currency
Administrator of the National Banks

Washington, D.C. 20219

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY WELLS FARGO BANK, N.A., TO ESTABLISH A COMMON TRUST FUND FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST ASSETS EXEMPT FROM TAXATION UNDER SECTION 408(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Introduction

Wells Fargo Bank, N.A. ("Wells Fargo" or the "Bank") proposes to establish a common trust fund ("Trust") for the collective investment of individual retirement account ("IRA") trust assets exempt from taxation under Section 408 of the Internal Revenue Code of 1954, as amended ("I.R.C."). Wells Fargo has requested this Office's confirmation that the Trust's activities comply with this Office's regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9, and with relevant provisions of the national banking laws, notably certain requirements of the Banking Act of 1933, as amended, 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78 ("Glass-Steagall Act"). For the reasons set forth below, this Office is of the view that the activities of the Trust, as hereinafter described, constitute bona fide fiduciary activities which comply with the requirements of 12 C.F.R. Part 9 (except for certain provisions with respect to which this Office exercises its approval authority under 12 C.F.R. § 9.18 (c) (5)) and are not inconsistent with the requirements of the Glass Steagall Act.

The Trust

Wells Fargo has established the Trust under the laws of California as a trust pursuant to a Declaration of Trust ("Trust

Agreement"). Under the Trust Agreement, Wells Fargo will act as the exclusive trustee ("Trustee") of the Trust. The Trust Agreement provides that Wells Fargo, as Trustee, will act as investment adviser, administrator, custodian and transfer agent to the Trust, and will have the power and authority necessary to act on behalf and for the protection of the Trust with respect to the investment, redemption, holding and distribution of Trust assets; Wells Fargo, as Trustee, also has executed an investment advisory agreement with the Trust. The activities of the Trustee will be conducted under the direction of a supervisory committee of the Trust, the members of which will assume those powers and duties imposed on investment company directors under the Investment Company Act of 1940 ("Investment Company Act") (15 U.S.C. §§ 80a-1 *et seq.*), and a majority of whose members will not be officers, directors or employees of the Bank within the meaning of the Investment Company Act.

Under the Trust Agreement, beneficial interests in the Trust will be divided into two series of non-transferable Units. The first series of Units will represent interests in a Corporate Index Fund, the assets of which shall be invested in a portfolio of common stocks approximating the capitalization-weighted composition of the Standard and Poor's 500 Stock Price Composite Index. The second series of Units will represent interests in Small Companies Stock Fund, the assets of which will be invested in a portfolio of equity securities approximating the capitalization-weighted composition of the Wells Fargo Bank Small Companies Stock Index, an index consisting of the fifth quintile of companies (bottom 20%) whose securities are listed on the New York Stock Exchange. The assets of each of the two funds, however, will be invested in money market instruments pending the attainment by each fund of a specified minimum level of funding.

Units in the Trust will be available exclusively to IRA trusts which are established with Wells Fargo in compliance with I.R.C. § 408, including simplified employee pensions created under I.R.C. § 408(j)-(k) ("qualified IRA trusts"). If, at any time, an IRA trust participating in the Trust ceases to be a qualified

IRA trust, the Trust Agreement provides that the Trustee shall withdraw from the Trust all Units owned by that participating trust. Each qualified IRA participant will execute a written agreement with Wells Fargo authorizing Wells Fargo, as trustee of the IRA trust, to invest IRA trust assets in Trust Units in conformance with the Trust Agreement. Qualified IRA trusts may place their assets in one or both series of Trusts Units, and may thereafter transfer assets from one series of Units to the other. Wells Fargo has received an opinion of counsel stating that the Trust qualifies as a common trust fund under I.R.C. § 584, and has applied to the Internal Revenue Service ("IRS") for a ruling to that effect.

The Trust Agreement, Trust registration materials, and relevant provisions of federal and California laws and regulations, together impose several significant restrictions on the activities of the Trust and Trustee. Under sections 2228-2239 of the California Civil Code, Wells Fargo, as Trustee, generally is required to administer the Trust for the exclusive benefit of the respective participants, and may not take any actions not explicitly permitted under the Trust Agreement which are inconsistent with the interests of these participants. In addition, Wells Fargo represents it will not promote its credit facilities to customers as a means of funding qualified IRA trusts, and qualified IRA trusts otherwise pledged or used as security for any loan will lose their qualified status under I.R.C. § 408 and hence their eligibility for participation in the Trust. The Trust also is precluded from investing in any securities or deposit instruments of Wells Fargo or its affiliates, and may not make any loans to Wells Fargo or any affiliate thereof. Moreover, Wells Fargo otherwise is precluded under this Office's regulations from having any interest in the Trust other than in its fiduciary capacity. 12 C.F.R. § 9.18(b)(8).

Wells Fargo intends to offer the Trust to IRA customers as part of a total IRA program, and will advertise the Trust as being merely one of several IRA alternatives. Specifically, Wells Fargo will offer the following IRA management alternatives: (i) Wells

Fargo certificates of deposit; (ii) the Trust; and (iii) self-directed brokerage accounts, transactions for which will be introduced by Wells Fargo for execution, clearance and settlement by an unaffiliated broker-dealer. IRA Trusts will be able to select one or more of the available IRA alternatives and thereafter to transfer assets from one alternative to another. IRA Trusts which participate in more than one of Wells Fargo's IRA alternatives will receive one consolidated account statement reflecting activities in each of the IRA options selected. Although Wells Fargo has established a separate schedule of fees for each of its IRA alternatives, the Bank's internal profit projections have been developed on a consolidated basis for all IRA alternatives. Accordingly, the Trust will not be marketed as a separate investment service independent of the other IRA options being offered.

In view of positions previously articulated by the Securities and Exchange Commission ("SEC") and its staff concerning the applicability of the Investment Company Act and the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*) ("Securities Act") to collective investment funds consisting of IRA trusts, Wells Fargo has determined to register the Trust with the SEC as an investment company under the Investment Company Act, and to register the Trust Units under the Securities Act, rather than undertaking the protracted process of seeking possible exemptions from these requirements.

Discussion

Wells Fargo's proposal to establish a collective fund for the collective investment of IRA trust assets is not a question of first impression for this Office. We previously have determined that the commingling of retirement trust assets by a national bank is a traditional bank fiduciary service explicitly acknowledged by this Office's fiduciary service regulations. *Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18 (c) (5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation Under Section 408 of the Internal*

Revenue Code of 1954 (October 21, 1982) ("*Citibank Decision*"),[1] at 2-3. Moreover, as previously observed, the commingling of IRA trust assets by a bank through the vehicle of a common trust fund or common investment fund was expressly recognized and confirmed by the Congress in the Employee Retirement Income Security Act of 1974 ("ERISA"). *Citibank Decision*, at 3-6. We further determined that the commingling of individual retirement trust assets as part of a bona fide fiduciary service was consistent with the requirements of the Glass-Steagall Act, as stated by the U.S. Supreme Court in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI v. Camp*"). *Citibank Decision*, at 6-11, 18-19.

A. Compliance of Trust with Supervisory Requirements Concerning the Collective Investment of Retirement Funds By National Banks.

The regulations of this Office concerning the collective investment of funds received in a fiduciary capacity are set forth in 12 C.F.R. Part 9, particularly 12 C.F.R. § 9.18. Title 12 C.F.R. Part 9 has been promulgated by this Office pursuant to the authority of 12 U.S.C. § 92a, which confers on national banks the right, subject to the approval of this Office and when not in contravention of local law, to engage in trust activities. Under these regulations, national banks are permitted to invest collectively, either by means of a common trust fund or a collective fund composed exclusively of assets of tax-exempt retirement, pension, profit-sharing, stock bonus or other similar trusts, funds received in a fiduciary capacity, subject to a number of requirements and restrictions.

This Office has examined the Wells Fargo application and supporting materials, and has determined that the administration of the Trust satisfied the requirements of 12 U.S.C. § 92a and 12 C.F.R. § 9.18, subject to certain exceptions as to which this Office

1. This decision has been challenged. *Investment Company Institute v. Conover*, Civil Action No. 83-0549, *dismissed without prejudice* (D.D.C. Nov. 30, 1983).

exercises its administrative approval authority under 12 C.F.R. § 9.18(c)(5) in order to allow the Trust to operate.

The provisions of the Trust Agreement governing, among other things, proportional interests, valuations, distributions, segregation, expenses, and evidences of interest comply with relevant provisions of 12 C.F.R. § 9.18.[2] Because the Trust consists exclusively of retirement assets which are held by Wells Fargo, the Trust is qualified under 12 C.F.R. § 9.18(a)(2) as a collective investment trust fund not subject to the advertising restrictions of 12 C.F.R. § 9.18(b)(5). *See* Comptroller's Trust Opinion No. 9.6100. Moreover, the Trust Agreement's prohibitions on transactions between the Trust on the one hand, and Wells Fargo and its affiliates on the other hand, and restrictions on Trust borrowings and Unit pledgings, satisfy the self-dealing and conflicts provisions of 12 C.F.R. § 9.18(b)(8). *See also* 12 C.F.R. § 9.12.

One provision of 12 C.F.R. § 9.18 which raises a question regarding the Trust's compliance is the requirement of 12 C.F.R. § 9.18(b)(12), which provides that a national bank must maintain "exclusive management" of its collective investment funds. Wells Fargo, out of an abundance of caution and in order to avoid protracted hearings before the SEC on requests for exemption, has chosen to register the Trust with the SEC under the Investment Company Act,[3] which states, among other things, that no investment company may have a board of directors of which a

2. Wells Fargo's fee structure for its IRA accounts will vary according to the deposit and investment options selected by the account holder. Fees charged to qualified IRA trusts participating in the Trust will be higher than those fees charged to IRA trusts which select the Bank's certificate of deposit option, although the Trust fees will be lower than those charged to IRA trusts choosing the self-directed brokerage option. The proportionate fee requirements of 12 C.F.R. § 9.18(b)(12) are satisfied, however, inasmuch as, according to Wells Fargo, the proportionate fees charged to participating IRA trusts would be much lower than any fees which would be charged to an IRA trust participant seeking to place assets in an individually-managed portfolio of securities approximating the investment strategies incorporated into the Trust Agreement.

3. *See discussion* at pp. 19-20 *infra*.

majority are officers, directors or employees of one bank. Investment Company Act § 10(c) (15 U.S.C. § 80a-10(c)). Accordingly, the overall direction of the Trust's affairs will be under the Trust's supervisory committee, the majority of which will be unaffiliated with Wells Fargo. Consequently, it may be argued that the Trust's compliance with the unaffiliated director provisions of the Investment Company Act is inconsistent with the "exclusive management" provisions of 12 C.F.R. § 9.18(b)(12).

We previously observed in the *Citibank Decision* that it was not clear that the Citibank collective trust approved in that decision, which also provided for a supervisory committee the majority of whose members would not be affiliated with the bank, would violate the exclusive management provisions of 12 C.F.R. § 9.18(b)(12), inasmuch as, "among other things, [Citibank] will serve at the outset as the investment adviser to the collective fund." *Citibank Decision*, at 18. Nevertheless, it was determined therein that approval was appropriate pursuant to this Office's authority under 12 C.F.R. § 9.18(c)(5) to permit the Citibank collective trust to operate in compliance with 12 C.F.R. § 9.18. Upon consideration of the Wells Fargo proposal, we similarly conclude that, while the Trust's activities may not satisfy the 12 C.F.R. § 9.18(b)(12) "exclusive management" requirements, it is appropriate to allow the Trust to be administered in accordance with the Office's authority under 12 C.F.R. § 9.18(c)(5).

The exclusive management provisions of 12 C.F.R. § 9.18(b)(12) are designed generally to ensure that a national bank fiduciary has the requisite authority to administer a collective fund in satisfaction of all its fiduciary responsibilities, and to prevent delegations or reservations of authority which interfere with the bank's fulfillment of these responsibilities. While Wells Fargo is sole Trustee and investment adviser to the Trust and hence has the authority to make all investment decisions for the Trust, the Trust's supervisory committee has ultimate control over, and responsibility for, the affairs of the Trust.

Nevertheless, we believe that the nature of the Trustee's relationship with the trust in this case is such that the Trustee has been accorded substantial management of the Trust and that, pursuant to 12 C.F.R. § 9.18(c)(5), the Trust may be permitted to operate in compliance with 12 C.F.R. § 9.18. In this regard, investment decision-making authority for the Trust is vested in the Trustee and may be exercised without the prior approval of the Trust's supervisory committee. Further, the Bank, as Trustee, serves in a number of capacities, including those of investment adviser, administrator, custodian and transfer agent to the Trust. Moreover, the Bank has clear responsibilities for all of the day-to-day activities of the Trust, and generally can be held fully accountable for actions taken in contravention of its fiduciary responsibilities. *See* pp. 16-17 *infra*. These facts and circumstances, in our view, adequately ensure that the Trustee's management responsibilities currently are sufficient to allow it to exercise substantially its fiduciary responsibilities, regardless of the Trust supervisory committee's ultimate oversight responsibilities. Should these facts and circumstances change, however, *i.e.*, should the Trust supervisory committee remove Wells Fargo as Trustee or investment adviser, this Office reserves the right to withdraw the 12 C.F.R. § 9.18(c)(5) approval granted herein.

Further, a bank administering a collective investment fund must cause a periodic audit of the fund to be made by auditors responsible only to the board of directors of the sponsoring bank. 12 C.F.R. § 9.18(b)(5)(i). The Trust Agreement establishing the Trust provides that the Bank will periodically cause an audit of the Fund to be conducted by independent certified public accountants responsible only to the Trust's supervisory committee, in accordance with the Investment Company act and rules thereunder. As indicated above, only a minority of the members of the supervisory committee are affiliated with the Bank. The Bank, however, as Trustee, will make all reports required by law or by the supervisory committee. Provided that the Bank also will have access, through the affiliated members of the supervisory committee, to the results of the periodic audits of the Trust,

we believe, pursuant to 12 C.F.R. § 9.18(c)(5), that the auditing procedures of the Trust are acceptable for purposes of 12 C.F.R. § 9.18(b).

B. Compliance with Glass-Steagall Act Requirements

We are asked to consider whether the Trust's activities may be conducted in compliance with relevant provisions of the Glass-Steagall Act. Specifically, Section 16 thereof (24 U.S.C. § 24 (Seventh)), states that a national banking association may not, except as otherwise explicitly provided, buy and sell "securities and stock" for its own account, and "shall not underwrite any issue of securities or stock. . . ." By the same token, Section 21 (12 U.S.C. § 378) provides that it is unlawful "[f]or any person, firm, corporation . . . engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . stocks, bonds, debentures, notes or other securities, to engage at the same time in the business of receiving deposits . . . ." The issue presented by the Wells Fargo application, therefore, is whether the activities of the Trust are proscribed by Sections 16 and 21 of the Glass-Steagall Act.[4]

This Office previously has determined that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." *Citibank Decision*, at 7. We stated that our conclusion is supported by the Supreme Court's decision in *ICI* v. *Camp*, which distinguished between the offering of traditional fiduciary services by a bank on the one hand, and the promotion of commingled agency accounts on the other hand, for purposes of the Glass-Steagall Act. *Citibank Decision*, at 7, 8-11. We further observed that the collective trust vehicle approved in the

4. We need not consider the applicability of Sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. § § 378 and 78), generally prohibiting affiliations and management interlocks between banks and firms engaged "principally" and "primarily" in the investment banking business, respectively, inasmuch as, among other things, it should follow that the Trust's activities would not be proscribed by Sections 20 and 32 if they pass muster under the provisions of Sections 16 and 21. *See Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 58 n.24, 64 (1981).

Citibank Decision was essentially a traditional banking service expressly confirmed by the Congress in ERISA and thus that it would be inappropriate to conclude that this sort of activity was proscribed by the Glass-Steagall Act. *Id.*

We have closely examined the Wells Fargo request, and carefully analyzed the materials submitted by the Bank in support of its request, and conclude that the proposed Wells Fargo Trust similarly represents the offering of a bona-fide fiduciary service expressly authorized by the Congress in ERISA. Accordingly, we conclude that the Trust's activities are consistent with the provisions of the Glass-Steagall Act and relevant case law. *ICI* v. *Camp, supra.*

Our conclusion regarding the *bona fides* of the fiduciary services proposed to be offered by Wells Fargo is supported first by the nature of the relationships between Wells Fargo and the Trust, and Wells Fargo and individual IRA participants, created by the Trust Agreement and relevant governing instruments. Under California law,[5] a valid express trust is created when the following elements exist: (i) a competent trustor, (ii) a trustor intent to create a trust, (iii) a trustee, (iv) an estate conveyed to the trustee, (v) acceptance of the estate by the trustee, (vi) a beneficiary, (vii) a legal purpose, and (viii) a legal term. Calif. Civil Code §§ 2216, 2218-19, 2221-22. *See, e.g., In re Johnson's Estate*, 303 P.2d 1 (Cal. 1965); *Reagh v. Kelley*, 89 Cal. Rep. 425, 10 C.A.3d 1082 (Cal. App. 1970); *Williams v. Miranda*, 323 P.2d 794 (Cal. App. 1965). Because the Wells Fargo Trust Agreement and qualified IRA trust agreements contain these elements, we are satisfied that the Trust and participating IRA trusts are valid trusts under California law. Similarly, the Trust satisfies applicable California law governing the establishment of a common trust fund. *See* Calif. Fin. Code § 1564. Accordingly, under the terms of 12 U.S.C. 92a, Wells Fargo is empowered to offer the fiduciary services represented by the Trust.[6]

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5. The terms of a trust instrument made and performed in California are governed by California law. *Desser v. Bank of America National Trust and Savings Association*, 353 F.2d 468 (9th Cir. 1965).

6. See p. 7 *supra.*

I.R.C. § 408(a) defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a written governing instrument meeting certain requirements. Inasmuch as the Trust and the qualified IRA trusts on their face appear to be bona fide trusts, and contain the terms required by I.R.C. § 408(a), they satisfy the establishment requirements of I.R.C. § 408 governing IRA trust accounts. In turn, because the qualified IRA trusts participating in the Trust have been established in compliance with I.R.C. § 408 and hence are eligible for commingling under I.R.C. § 408(a)(5), we are satisfied that the Trust represents exactly that sort of IRA commingling activity sanctioned by the Congress in ERISA. *See* H. R. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 5116-5117; *Citibank Decision*, at 2-6.[7]

Because the Trust, and participating IRA trusts, have been established as trusts under California law, and in compliance with I.R.C. § 408, the Bank is subject to significant obligations as Trustees of the Trust and the qualified IRA trusts. Among other things, Wells Fargo will be subject to strict requirements of California law obligating the Bank to administer the Trust and qualified IRA trusts for the exclusive benefit of the Trust participants, and broadly prohibiting trustee self-dealing, undisclosed adverse interests, transactions involving undue influence on the part of a trustee, and fraudulent trustee conduct. Calif. Civil Code §§ 2228-2239. *See also* Calif. Civil Code § 2261. *See generally* Restatement (Second) of Trusts §§ 169-185 (1959). In addition, the Bank, as Trustee, is subject to relevant provisions of the I.R.C. and regulations promulgated thereunder, governing, among other things, prohibited transactions by "disqualified persons" (which include fiduciaries). *See* I.R.C. § 4975. These provisions effectively limit the Bank's ability to use Trust assets

7. The Trust has sought a ruling from the Internal Revenue Service that it is eligible for treatment under I.R.C. § 584 as a common trust fund. The common trust fund qualification, however, is not required for the trust to operate in compliance with I.R.C. § 408. *See* I.R.C. § 408(a)(5).

to, among other things, purchase its own securities or deposit instruments, to lend or borrow money from the Trust, or otherwise apply trust assets to purposes other than those exclusively benefiting its participants. Similar restrictions are imposed by this Office's fiduciary regulations. *See* 12 C.F.R. §§ 9.12, 9.18(b)(8).[8] Wells Fargo has indicated its intention to comply with the above-mentioned provisions of law.

The *bona fides* of the Trust fiduciary relationships is further demonstrated by the purposes for which an individual trustor establishes an IRA trust. The participant is not seeking short-term investment profit but instead is seeking preservation and management of assets that will be available only to the participant when the participant reaches age 59½, or to the participant's beneficiaries in the event of death, unless the participant is willing to incur substantial tax penalties. *See* I.R.C. § 408(f). Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death. *See* I.R.C. § 408(a). Accordingly, there is nothing either in the terms or purposes of the Trust or qualified IRA Trusts to suggest that they should be treated as anything other than bona fide trust relationships for purposes of our analysis,[9] and we conclude that on the face of the trust relationships established, the Trust represents a bona fide fiduciary service not subject to the Glass-Steagall Act. *ICI* v. *Camp*, 401 U.S. 624-25, 638.

Continuing our inquiry further, we find that, as was the case with the Citibank collective investment fund, the hazards and potential abuses created when a commercial bank enters the investment banking business, and against which Congress sought

8. California Financial Code § 1591 also prohibits the commingling of corporate assets and trust funds or the use of trust funds in the conduct of corporate business, and makes knowing violations of this section by any bank officer a felony.

9. We have no reason to believe that the federal judiciary would not treat IRA trust accounts as true fiduciary relationships between financial institutions and individuals. *See, e.g., In re Dunn*, 5 Bankr. Rep. 156 (U.S. Bankr. Ct., N.D. Tex. 1980).

to legislate in the Glass-Steagall Act,[10] do not exist or are negligible in the instant application. *See Citibank Decision*, at 9-11. As we noted therein, the purpose and nature of the collective investment of IRA assets, together with the restrictions of the I.R.C. and 12 C.F.R. Part 9, reduce the danger of promotional abuses identified by the Court in *ICI v. Camp*. Moreover, we can identify features of the Wells Fargo application which further reduce potential Glass-Steagall Act hazards. Among other things, because of restrictions contained in California and federal law, the Trust will not be promoted as the type of collective investment vehicle prohibited by the Glass-Steagall Act. As noted above, relevant provisions of California fiduciary law broadly prohibit any Trustee activities which conflict or otherwise are inconsistent with the interests of the Trust participants. By the same token, under federal law (I.R.C. § 408(e)-(f)) and the Trust Agreement, contributions to IRAs and distributions of IRA assets are subject to significant tax-oriented limitations; although assets of an IRA may, under certain conditions, be redirected to another investment option or another IRA trustee, continuous, high-volume Unit redemptions are not expected to occur.

Accordingly, it would appear that relevant state fiduciary provisions (as well as 12 C.F.R. Part 9) will substantially control the types of hazards identified in *ICI v. Camp*. Similarly, while the Trust Units are, in one sense, freely purchased or redeemed, the tax disincentives built into premature redemptions effectively limit potential promotional pressures on the Bank. Of equal significance is the fact that the Trust will be promoted as part of a total IRA program offered by Wells Fargo, *i.e.*, merely one of

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10. In *ICI v. Camp*, the Court identified these hazards and abuses as involving: (i) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (ii) the temptation to support the securities firm with unsound loans; (iii) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (iv) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (v) the interference by the bank's securities business with the bank's ability to provide disinterested investment advice. 401 U.S. at 630-33.

several individual retirement options available to its customers, and not as a new and separate collective vehicle for the investment of non-fiduciary assets. In addition, Wells Fargo has represented that it will not promote the availability of loans from its credit department for the purpose of funding an IRA.

In sum, the legal nature of the Trust and qualified IRA trusts, coupled with the restrictions on the promotion and availability of the Trust for general investment purposes, plainly distinguishes the Trust from the type of managed agency collective account vehicle prohibited under the Glass-Steagall Act. *ICI* v. *Camp*, 401 U.S. at 638. As the Supreme Court observed, "[T]here is a plain difference between the sale of fiduciary services and the sale of investments." *Id.* *See also Citibank Decision*, at 6-11. That plain difference has been established to our satisfaction with respect to the type of service being offered by Wells Fargo through the Trust, and we conclude that the Trust may operate in compliance with Sections 16 and 21 of the Glass-Steagall Act.

Our Conclusion is not affected by the fact that Wells Fargo has chosen to register the Trust, and participations therein, with the SEC under the Investment Company Act and Securities Act, respectively. As noted above, Wells Fargo has selected this course of action in light of past SEC and SEC staff interpretations regarding the availability of certain exemptions under these statutes for, among other things, common trust funds and collective pension, profit sharing and retirement accounts (and interests in such funds and accounts).[11] Whatever the merits of the SEC's positions, which were discussed at length in the *Citibank Decision* (at pp. 11-18), the requirements of the Securities Act and the Investment Company Act have no significant relevance to the issue at hand, *i.e.*, whether the Wells Fargo Trust represents the offering of a bona fide fiduciary service under the Glass-Steagall Act. In addition, we note that the scheme of federal securities regulation, directed towards the protection of investors,

11. *See, e.g.*, Section 3(2) of the Securities Act (15 U.S.C. § 77c(2)); Sections 3(c)(3) and 3(c)(11) of the Investment Company Act (15 U.S.C. §§ 80a-3(c)(3) and 80a-3(c)(11)).

differs significantly in purpose and function from the Glass-Steagall Act, a statutory scheme designed to protect the interest of bank depositors and the safety and soundness of the banking system, and the administration of which in this case is the statutory responsibility of this Office. In light of the foregoing, it is sufficient to note that the SEC's positions with respect to relevant provisions of the federal securities laws are not inconsistent with our conclusion that the Wells Fargo Trust is a bona fide fiduciary service which complies with applicable provisions of the Glass-Steagall Act. *See A.G. Becker Incorporated v. Board of Governors of the Federal Reserve System*, 693 F.2d 136 (D.C. Cir. 1982), *petition for cert. granted sub nom. Securities Industry Association v. Board of Governors of the Federal Reserve System*, U.S. , 104 S. Ct. 65 (1983).

Conclusion

Upon extensive and considered analysis of the request and supporting materials submitted by the Bank, we have concluded that the activities of the Trust, as described above and in the materials submitted, represent a bona fide fiduciary service which complies, with the permission granted herein pursuant to 12 C.F.R. § 9.18(c)(5), with the requirements of 12 U.S.C. § 92a and 12 C.F.R. Part 9 promulgated thereunder, and also complies with relevant provisions of the Glass-Steagall Act. Accordingly, for the reasons stated above, it is our opinion that the Bank may lawfully offer this fiduciary service.

/s/ H. JOE SELBY

H. Joe Selby
Senior Deputy Comptroller for
Bank Supervision

Dated: January 27, 1984

[Reprinted]

Comptroller of the Currency
Administrator of the National Banks

Washington, D.C. 20219

January 31, 1984

Mr. John H. McGuckin, Jr.
Vice President and Associate Counsel
Bank of California, N.A.
P.O. Box 45000
San Francisco, California 94145

Dear Mr. McGuckin:

This is in response to your various letters of last Fall regarding the bank's planned offering of collective investment to IRA customers. The bank's program, involving four separate Investment Portfolios, is quite similar to the previously-approved IRA program of other banks. *See Decision of the Comptroller of the Currency on the Application by Citibank, N.A. , Pursuant to 12 C.F.R. § 9.18(c) (5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954* (October 31, 1982); *Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A. to Establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954, as Amended* (January 27, 1984). The Office is of the view that the activities described in your letters and attachments thereto constitute bona fide fiduciary activities which comply with the requirements of 12 C.F.R. Part 9 and are not inconsistent with the requirements of the Glass-Steagall Act, specifically 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78.

This Office has carefully considered the features of the bank's collective trust and the participating IRA trusts. In two respects,

the bank's collective trust appears to deviate from the requirements of 12 C.F.R. § 9.18(b). The pertinent provisions require the bank to exercise exclusive management over its collective investment funds and require the outside auditors to be responsible solely to the bank's board of directors. See 12 C.F.R. §§ 9.18(b)(5)(i), 9.18(b)(12). Both provisions conflict with aspects of the IRA program which arise out of the bank's decision to register the collective trust with the Securities and Exchange Commission as an "investment company" under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*

For the reasons set forth in the above-cited Decisions, which are equally applicable to the bank's IRA program, this Office grants permission pursuant to 12 C.F.R. § 9.18(c)(5) for the bank to operate the proposed collective trust. As with the previous applications by other banks, the Office reserves the right to rescind this approval should the supervisory committee of the bank's collective trust interfere with or terminate the management duties of the bank as trustee and investment adviser to the collective trust.

Very truly yours,

/s/ H. Joe Selby

H. Joe Selby
Senior Deputy Comptroller for
Bank Supervision

[Reprinted]

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY CONNECTICUT BANK AND TRUST COMPANY, N.A., TO ESTABLISH A COMMON TRUST FUND FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST ASSETS EXEMPT FROM TAXATION UNDER SECTION 408(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Introduction

Connecticut Bank and Trust Company, N.A. ("CBT" or the "Bank") proposes to establish a collective investment trust ("Trust") for the collective investment of individual retirement account ("IRA") trust assets exempt from taxation under Section 408 of the Internal Revenue Code of 1954, as amended ("I.R.C."). CBT seeks this Office's confirmation that the Trust's activities comply with this Office's regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9, and with relevant provisions of the national banking laws, notably certain requirements of the Banking Act of 1933, as amended, 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78 ("Glass-Steagall Act"). For the reasons set forth below, this Office has determined that the activities of the Trust, as hereinafter described, constitute bona fide fiduciary activities authorized to national banks under applicable laws which comply with the requirements of 12 C.F.R. Part 9 (except for certain provisions with respect to which this Office exercises its approval authority under 12 C.F.R. § 9.18(c)(5)) and are not inconsistent with the requirements of the Glass-Steagall Act.

The Trust

CBT has established the Trust under the laws of Connecticut as a trust pursuant to a Declaration of Trust ("Trust Agreement"). Under Trust Agreement, CBT will act as the exclusive trustee ("Trustee") of the Trust. The Trust Agreement provides

that CBT, as Trustee, will act as investment adviser, administrator, custodian and transfer agent to the Trust, and will have the power and authority necessary to act on behalf and for the protection of the Trust with respect to the investment, redemption, holding and distribution of trust assets; CBT, as Trustee, also has executed an investment advisory agreement with the Trust. The activities of the Trustee will be conducted under the direction of a supervisory committee of the Trust, the members of which will assume those powers and duties imposed on investment company directors under the Investment Company Act of 1940 ("Investment Company Act") (15 U.S.C. §§ 80a-1 *et seq.*), and a majority of whose members will not be officers, directors or employees of the Bank within the meaning of the Investment Company Act.

Under the Trust Agreement, beneficial interests in the Trust will be divided into three classes of non-transferable Units. The first series of Units will represent interests in a U.S. Government Securities Portfolio, the assets of which will be invested in a portfolio of fixed-income securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities with maturities of up to seven years. It seeks to increase participating assets by providing current income and stability of principal. The second class of Units will represent interests in an Equity Growth Portfolio, the assets of which will be invested in a portfolio of equity securities or securities convertible into equity securities of mature, well-established, large and medium-sized companies whose securities are actively traded. It seeks to increase participating Trust assets by providing long-term capital appreciation, with current income a secondary objective. The third class of Units will represent interests in a Special Equity Portfolio, the assets of which will be invested in a portfolio of equity securities or securities convertible into equity securities of smaller and medium-sized growth-oriented companies which may not have an established long-term operating record. This Portfolio, which seeks to increase participating Trust assets by providing long-term capital appreciation, is intended for participants who can accept a somewhat higher level of risk.

Units in the Trust will be available exclusively to IRA trusts which are established with CBT in compliance with I.R.C. § 408, including simplified employee pensions created under I.R.C. § 408(j)-(k) ("qualified IRA trusts"). If, at any time, an IRA trust participating in the Trust ceases to be a qualified IRA trust, the Trust Agreement provides that the Trustee shall withdraw from the Trust all Units owned by that participating trust. Each qualified IRA participant will execute a written agreement with CBT authorizing CBT, as trustee of the IRA trust, to invest IRA trust assets in Trust Units in conformance with the Trust Agreement. Qualified IRA trusts may place their assets in one or more series of Trust Units, and may thereafter transfer assets from one series of Units to another. CBT has received an opinion of counsel stating that the Trust qualifies as a common investment fund under I.R.C. § 408, and has applied to the Internal Revenue Service ("IRS") for a ruling to that effect.

The Trust Agreement, Trust registration materials, and relevant provisions of federal and Connecticut laws and regulations, together impose several significant restrictions on the activities of the Trust and Trustee. Under Connecticut law, CBT, as Trustee, generally is required to administer the Trust for the exclusive benefit of the respective participants, and may not take any actions not explicitly permitted under the Trust Agreement which are inconsistent with the interests of these participants. For example, Connecticut law imposes upon the Trustee significant fiduciary duties and obligations, including the duty to obey the donor's instructions, [1] to protect the fund,[2] to exercise due diligence,[3] to be completely loyal to the interests of the beneficiaries,[4] and to avoid being influenced by any third-party or personal interest which may conflict with duties as Trustee.[5] In addition,

1. *Conway v. Emeny*, 96 A.2d 221, 139 Conn. 612 (1953).
2. *Palmer v. Hartford National Bank & Trust Company*, 279 A.2d 726, 160 Conn. 415 (1971).
3. *McClure v. Middleton Trust Company*, 110 A. 838, 95 Conn. 148 (1920).
4. *Phillips v. Moeller*, 170 A.2d 897, 148 Conn. 361 (1961); *Conway v. Emeny, supra*, 96 A.2d 221, n. 11.
5. *Lyman v. Stevens*, 197 A. 313, 123 Conn. 591 (1938).

CBT represents that it will not promote its credit facilities to customers as a means of funding qualified IRA trusts, and qualified IRA trusts otherwise pledged or used as security for any loan will lose their qualified status under I.R.C. § 408 and hence their eligibility for participation in the Trust. The Trust also is precluded from investing in any securities or deposit instruments of CBT or its affiliates, and may not make any loans to CBT or any affiliate thereof. Moreover, CBT otherwise is precluded under this Office's regulations from having any interest in the Trust other than in its fiduciary capacity. 12 C.F.R. § 9.18(b)(8).

CBT intends to offer the Trust to IRA customers as part of a total IRA program, and will advertise the Trust as being merely one of several IRA alternatives. Specifically, CBT will offer the following IRA management alternatives: (i) CBT savings accounts; (ii) the Trust; and (iii) stocks, bonds or U.S. Treasury securities. IRA trusts will be able to select one or more of the available IRA alternatives and thereafter to transfer assets from one alternative to another. IRA trusts which participate in more than one of the CBT IRA alternatives will receive one consolidated account statement reflecting activities in each of the IRA options selected. Although CBT has established a separate schedule of fees for each of its IRA alternatives, the Bank's internal profit projections have been developed on a consolidated basis for all IRA alternatives. Accordingly, the Trust will not be marketed as a separate investment service independent of the other IRA options being offered.

In view of Securities and Exchange Commission ("SEC") and SEC staff interpretive positions concerning the applicability of the Investment Company Act and the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*) ("Securities Act") to collective investment funds consisting of IRA trusts, CBT has determined to register the Trust with the SEC as an investment company under the Investment Company Act, and to register the Trust Units under the Securities Act, rather than undertaking the protracted process of seeking possible exemptions from these requirements.

Discussion

CBT's proposal to establish a collective fund for the collective investment of IRA trust assets is not a question of first impression for this Office. We previously have determined that the commingling of retirement trust assets by a national bank is a traditional bank fiduciary service explicitly acknowledged by this Office's fiduciary service regulations, and that the commingling of IRA trust assets was authorized by the Congress when it enacted relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). *Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c) (5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation Under Section 408 of the Internal Revenue Code of 1954* (Oct. 21, 1982) ("*Citibank Decision*") at 2-3. This decision was challenged, and this Office's position was affirmed in *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984) ("*D.C. Opinion*"). In January 1984, this Office approved similar applications made by Wells Fargo Bank, N.A., and the Bank of California, N.A., to establish collective funds for the investment of IRA trust assets. *Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A., to establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt from Taxation under Section 408(a) of the Internal Revenue Code of 1954, as amended* (January 27, 1984) ("*Wells Fargo Decision*") at 1; Letter from H. Joe Selby, Senior Deputy Comptroller, to John H. McGuckin, Esquire, Bank of California, January 31, 1984. These decisions were also challenged. A decision setting aside this Office's two rulings was issued on August 28, 1984, *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and has been stayed pending appeal ("*California Opinion*").

We remain of the view previously expressed, notwithstanding the controversy that followed these earlier decisions and despite the fact that *Wells Fargo Decision* has been set aside by the

district court and is now pending appeal. As the District Court pointed out in upholding the *Citibank Decision*, the commingling of IRA trust assets by a bank through the vehicle of a common trust fund or common investment fund was expressly recognized and confirmed by the Congress in ERISA. *D.C. Opinion*, 596 F. Supp. at 1500, 1501. That same decision also affirmed that the commingling of individual retirement trust assets as part of a bona fide fiduciary service was consistent with the requirements of the GlassSteagall Act, as stated by the U.S. Supreme Court in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI* v. *Camp*"). *D.C. Opinion*, 596 F. Supp. at 1501-1503.

A. Compliance of Trust with Supervisory Requirements Concerning the Collective Investment of Retirement Trusts By National Banks

The regulations of this Office concerning the collective investment of funds received in a fiduciary capacity are set forth in 12 C.F.R. Part 9, particularly 12 C.F.R. § 9.18. Title 12 C.F.R. Part 9 has been promulgated by this Office pursuant to the authority of 12 U.S.C. § 92a, which confers on national banks the right, subject to the approval of this Office and when not in contravention of local law, to engage in trust activities. Under these regulations, national banks are permitted to invest collectively, either by means of a common trust fund or a collective fund composed exclusively of assets of tax-exempt retirement, pension, profit-sharing, stock bonus or other similar trusts, funds received in a fiduciary capacity, subject to a number of requirements and restrictions.

This Office has examined the CBT application and supporting materials, and has determined that the administration of the Trust satisfies the requirements of 12 U.S.C. § 92a and 12 C.F.R. § 9.18, subject to certain exceptions as to which this Office exercises its administrative approval authority under 12 C.F.R. § 9.18(c)(5) in order to allow the Trust to operate. The provisions of the Trust Agreement governing, among other things, proportional interests, valuations, distributions, segregation,

expenses, and evidences of interest comply with relevant provisions of 12 C.F.R. § 9.18.[6] Because the Trust consists exclusively of retirement assets which are held by CBT, the Trust is qualified under 12 C.F.R. § 9.18(a)(2) as a collective investment trust fund not subject to the advertising restrictions of 12 C.F.R. § 9.18(b)(5). *See* Comptroller's Trust Opinion No. 9.6100. Moreover, the Trust Agreements, prohibitions on transactions between the Trust on the one hand, and CBT and its affiliates on the other hand, and restrictions on Trust borrowings and Unit pledgings, satisfy the self-dealing and conflicts provisions of 12 C.F.R. § 9.18(b)(8). *See also* 12 C.F.R. § 9.12.

One provision of 12 C.F.R. § 9.18 which raises a question regarding the Trust's compliance is the requirement of 12 C.F.R. § 9.18(b)(12), which provides that a national bank must maintain "exclusive management" of its collective investment funds. CBT, out of an abundance of caution and in order to avoid protracted hearings before the SEC on requests for exemption, has chosen to register the Trust with the SEC under the Investment Company Act,[7] which states, among other things, that no investment company may have a board of directors of which a majority are officers, directors or employees of one bank. Investment Company Act § 10(c) (15 U.S.C. § 80a-10(c)). Accordingly, the overall direction of the Trust's affairs will be under the Trust's supervisory committee, the majority of which will be unaffiliated with CBT. Consequently, it may be argued that the Trust's compliance with the unaffiliated director provisions of the

6. CBT's fee structure for its IRA accounts will vary according to the deposit and investment options selected by the account holder. Fees charged to qualified IRA trusts participating in the Trust will be higher than those fees charged to IRA trusts which select the Bank's certificate of deposit option. The proportionate fee requirements of 12 C.F.R. § 9.18(b)(12) are satisfied, however, inasmuch as, according to CBT, the proportionate fees charged to participating IRA trusts would be much lower than any fees which would be charged to an IRA trust participant seeking to place assets in an individuallymanaged portfolio of securities approximating the investment strategies incorporated into the Trust Agreement.

7. *See* discussion at pp. 25-28 *infra*.

Investment Company Act is inconsistent with the "exclusive management" provisions of 12 C.F.R. § 9.18(b)(12).

We previously observed in the *Citibank Decision* that it was not clear that the Citibank collective trust approved in that decision, which also provided for a supervisory committee the majority of whose members would not be affiliated with the bank, would violate the exclusive management provisions of 12 C.F.R. § 9.18(b)(12), inasmuch as, "among other things, [Citibank] will serve at the outset as the investment adviser to the collective fund." *Citibank Decision*, at 18. Nevertheless, we determined therein that approval was appropriate pursuant to this Office's authority under 12 C.F.R. § 9.18(c)(5) to permit the Citibank collective trust to operate in compliance with 12 C.F.R. § 9.18. Upon consideration of the CBT proposal, we similarly conclude that, while the Trust's activities may satisfy the 12 C.F.R. § 9.18(b)(12) "exclusive management" requirements, it is appropriate to allow the Trust to be administered in accordance with the Office's authority under 12 C.F.R. § 9.18(c)(5).

The exclusive management provisions of 12 C.F.R. § 9.18(b)(12) are designed generally to ensure that a national bank fiduciary has the requisite authority to administer a collective fund in satisfaction of all its fiduciary responsibilities, and to prevent delegations or reservations of authority which interfere with the bank's fulfillment of these responsibilities. While CBT is sole Trustee and investment adviser to the Trust and hence has the authority to make all investment decisions for the Trust, the Trust's supervisory committee has ultimate control over, and responsibility for, the affairs of the Trust.

Nevertheless, we believe the nature of the Trustee's relationship with the Trust in this case is such that the Trustee has been accorded substantial management of the Trust and that, pursuant to 12 C.F.R. § 9.18(c)(5), the Trust may be permitted to operate in compliance with 12 C.F.R. § 9.18. In this regard, investment decision-making authority for the Trust is vested in the Trustee and may be exercised without the prior approval of the Trust's supervisory committee. Further, the Bank, as Trustee, serves in

a number of capacities, including those of investment adviser, administrator, custodian and transfer agent to the Trust. Moreover, the Bank has clear responsibilities for all of the day-to-day activities of the Trust, and generally can be held fully accountable for actions taken in contravention of its fiduciary responsibilities. *See* p.18 *infra*. These facts and circumstances, in our view, adequately ensure that the Trustee's management responsibilities currently are sufficient to allow it to exercise substantially its fiduciary responsibilities, regardless of the Trust supervisory committee's ultimate oversight responsibilities.[8] Should these facts and circumstances change, however, *i.e.*, should the Trust supervisory committee remove CBT as Trustee or investment adviser, this Office reserves the right to withdraw the 12 C.F.R. § 9.18(c)(5) approval granted herein.

Further, a bank administering a collective investment fund must cause a periodic audit of the fund to be made by auditors responsible only to the board of directors of the sponsoring bank. 12 C.F.R. § 9.18(b)(5)(i). The Trust Agreement establishing the Trust provides that the Bank will periodically cause an audit of the Trust to be conducted by independent certified public accountants responsible only to the Trust's supervisory committee, in accordance with the Investment Company Act and rules

8. The *California Opinion* rejected the Comptroller's conclusion on this point, saying that banks cannot retain exclusive fiduciary responsibility for their common trusts when they delegate "ultimate control" to outsiders. But the court failed to recognize that under the existing facts, CBT does retain "ultimate control" for purposes of Part 9, despite the composition of the Board. 593 F. Supp. at 854. The crux of the matter is that CBT, as investment adviser to the Trust, has clear responsibility for the Trust's day-to-day operation and full investment decisionmaking authority. The Comptroller's view as to what constitutes "exclusive management" for purposes of Part 9, a regulation which he has promulgated and has particular expertise to administer, should have been accorded greater deference by the District Court. In addition, the Court failed to recognize that the "nonaffiliation" of the supervisory committee is solely the product of securities law requirements. While the *California Opinion* recognized that neither the definitions of the securities laws nor the question of registration *vel non* thereunder is dispositive of the scope of the Glass-Steagall Act (593 F. Supp. at 852-854), the Opinion in effect contradicts this view by in part basing its determination that the bank's common trusts are illegal on a factor that flows solely from securities registration.

thereunder. As indicated above, only a minority of the members of the supervisory committee are affiliated with the Bank. The Bank, however, as Trustee, will make all reports required by law or by the supervisory committee. Provided that the Bank also will have access, through the affiliated members of the supervisory committee, to the results of the periodic audits of the Trust, we believe, pursuant to 12 C.F.R. § 9.18(c)(5), that the auditing procedures of the Trust are acceptable for purposes of 12 C.F.R. § 9.18(b).

B. **Compliance with Glass-Steagall Act Requirements**

As we have done previously, we consider whether the Trust's activities may be conducted in compliance with relevant provisions of the Glass-Steagall Act. Specifically, Section 16 thereof (12 U.S.C. § 24 (Seventh)), states that a national banking association may not, except as otherwise explicitly provided, buy and sell "securities and stock" for its own account, and "shall not underwrite any issue of securities or stock . . . ." By the same token, Section 21 (12 U.S.C. § 378) provides that it is unlawful "[f]or any person, firm, corporation . . . engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . stocks, bonds, debentures, notes or other securities, to engage at the same time in the business of receiving deposits . . . ." The issue presented by this application, therefore, is whether the activities of the Trust are prohibited by Sections 16 and 21 of the Glass-Steagall Act.[9]

This Office previously has determined that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA

9. We need not consider the applicability of Sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. §§ 377 and 78), generally prohibiting affiliations and management interlocks between banks and firms engaged "principally" and "primarily" in the investment banking business, respectively, inasmuch as, among other things, it should follow that the Trust's activities would not be prohibited by Sections 20 and 32 if they pass muster under the provisions of Sections 16 and 21. *See Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 58 n.24, 64 (1981).

trust assets." *Citibank Decision*, at 7. We stated that our conclusion is supported by the Supreme Court's decision in *ICI v. Camp*, which distinguished between the offering of traditional fiduciary services by a bank on the one hand, and the promotion of commingled agency accounts on the other hand, for purposes of the Glass-Steagall Act. *Citibank Decision*, at 7, 8-11. We further observed that the collective trust vehicle approved in the *Citibank Decision* was essentially a traditional banking service expressly confirmed by the Congress in ERISA and thus that it would be inappropriate to conclude that this sort of activity was prohibited by the Glass-Steagall Act. *Id.* Our analysis in the *Citibank Decision* was upheld in the *D.C. Opinion*, which stated that ERISA

> allow[s] the commingling of the IRA Trust assets in either a common trust or a common investment fund and that [s]such funds have long been considered traditional banking services for retirement assets, and there is a clear indication that Congress fully intended IRA assets to be invested in this manner.

D.C. Opinion, 596 F. Supp. at 1501.

In the *Wells Fargo Decision*, we considered an application substantially similar to that of Citibank, and concluded that the Wells Fargo Trust also represented the offering of a traditional fiduciary service expressly authorized by Congress in ERISA.

While the rationale on which we based this decision was not accepted in the *California Opinion*, we believe that it is supported by a strong statutory framework. It is clear, as the *D.C. Opinion* held, that the two California funds which were set aside in the *California Opinion* "were considered by Congress to be a natural extension of traditional banking activities" and therefore do not violate Glass-Steagall. *D.C. Opinion*, 596 F. Supp. at 1501. Accordingly, since the proposed activities of CBT are in all material respects identical to these others which we have previously considered and approved, we here conclude that the Trust's activities are consistent with the provisions of Glass-Steagall and relevant case law. *ICI* v. *Camp, supra.*

Our conclusion regarding the permissibility of the fiduciary services proposed to be offered by CBT is supported by the nature of the relationships between CBT as trustee of the Trust, and CBT as trustee of the individual IRA participants. Under Connecticut law, a valid express trust is created when the following elements exist: (i) a trustor intent to create a trust, (ii) a trustee, (iii) a trust property, which is held by the trustee for the beneficiary, and (iv) a beneficiary. *South End Bank and Trust Company v. Hurwitz*, 21 A.2d 407, 128 Conn. 204 (1941); *Marzahl v. Colonial Bank and Trust Company*, 364 A.2d 173, 170 Conn. 62 (1976). CBT also has provided its opinion of counsel that the CBT Trust Agreement and qualified IRA trust agreements contain these elements. Because the Trust Agreement and the qualified IRA trust agreements contain the elements required under Connecticut law, we are satisfied as to the validity of the Trust and participating IRA trusts. Similarly, the Trust satisfies applicable Connecticut law governing the establishment of a common trust fund. *See* Connecticut General Statute § 3683. Accordingly, under the terms of 12 U.S.C. § 92a, CBT is empowered to offer the fiduciary services represented by the Trust.[10]

Further, the CBT Trust, consisting of qualified IRA trust assets, is an activity authorized under ERISA. I.R.C. § 408(a) defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a written governing instrument meeting certain requirements. Inasmuch as the Trust and the qualified IRA trusts on their face appear to be bona fide trusts, and contain the terms required by I.R.C. § 408(a), they satisfy the establishment requirements of I.R.C. § 408 governing IRA trust accounts. In turn, because the qualified IRA trusts participating in the Trust have been established in compliance with I.R.C. § 408 and hence are eligible for commingling under I.R.C. § 408(a)(5), we are satisfied that the Trust represents exactly that sort of IRA commingling activity sanctioned by the Congress in ERISA. *See* H.R. Rep. No. 1280, 93d

10. *See* pp.8-9 *supra*.

Cong., 2d Sess., (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5116-5117; *Citibank Decision*, at 2-6.[11] This determination was affirmed in the *D.C. Opinion*, 596 F. Supp. at 1501-02.

Because the Trust, and participating IRA trusts, have been established as trusts under Connecticut law, and in compliance with I.R.C. § 408, the Bank is subject to significant obligations as Trustee of the Trust and the qualified IRA trusts. Among other things, CBT will be subject to strict requirements of Connecticut law obligating the Bank to administer the Trust and qualified IRA trusts for the exclusive benefit of the Trust participants, and broadly prohibiting trustee self-dealing, third-party interest, undisclosed adverse interests, transactions involving undue influence on the part of a trustee, and fraudulent trustee conduct. *See generally* Restatement (Second) of Trusts §§ 169-185 (1959). In addition, the Bank, as Trustee, is subject to relevant provisions of the I.R.C. and regulations promulgated thereunder, governing, among other things, prohibit transactions by "disqualified persons" (which include fiduciaries). *See* I.R.C. § 4975. These provisions effectively limit the Bank's ability to use Trust assets to purchase its own securities or deposit instruments, to lend or borrow money from the Trust, or otherwise apply trust assets to purposes other than those exclusively benefiting its participants. Similar restrictions are imposed by this Office's fiduciary regulations. *See* 12 C.F.R. §§ 9.12, 9.18(b)(8). CBT has indicated its intention to comply with the above-mentioned provisions of the law.

The fiduciary nature of the Trust is further demonstrated by the purposes for which an individual trustor establishes an IRA trust, and by the restrictions imposed by ERISA which assure that CBT "cannot serve simply as a vehicle for investment" (*D.C. Opinion*, 596 F. Supp. at 1502). The participant is not seeking a short-term profit, but is primarily interested in preservation, management and growth of assets that will be available to him only upon reaching age 59½, or to his beneficiaries in the event of

11. The Trust has sought a ruling from the Internal Revenue Service that it is eligible for treatment under I.R.C. § 408 as a common investment fund.

death, unless the participant is willing to incur substantial tax penalties. *See* I.R.C. § 408(f). Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death. See I.R.C. § 408(a). Accordingly, there is nothing either in the terms or purposes of the Trust or qualified IRA trusts to suggest that they should be treated as anything other than bona fide trust relationships for purposes of our analysis,[12] and we conclude that on the face of the trust relationships established, the Trust represents a bona fide fiduciary service not prohibited by the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. at 624-25, 638. Our views regarding the fiduciary nature of these activities are not adversely affected by the fact that CBT may promote its Trust and other IRA options. *See* discussion at pp. 28-30 *infra*.

Further, we have determined that the hazards and potential abuses created when a commercial bank enters the investment banking business, and against which Congress sought to legislate in the Glass-Steagall Act,[13] do not exist or are negligible in the instant application. *See Citibank Decision*, at 9-11. As we noted therein, the purpose and nature of, among other things, the collective investment of IRA assets, together with the restrictions of the I.R.C., reduce the danger of promotional abuses identified by the Court in *ICI v. Camp*. Moreover, we can identify other features of the CBT application which further reduce potential Glass-Steagall Act hazards. For example, applicable provisions

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12. The *California Opinion*, in setting aside the Comptroller's decision in Wells Fargo, disputed this analysis and suggested that the funds were primarily of an investment rather than a fiduciary nature. *See* pp. 21-22 *infra*.

13. In *ICI v. Camp*, the Court identified these hazards and abuses as involving: (i) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (ii) the temptation to support the securities firm with unsound loans; (iii) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (iv) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (v) the interference by the bank's securities business with the bank's ability to provide disinterested investment advice. 401 U.S. at 630-33.

of state and federal law broadly prohibit transactions between the Trust and the Trustee, or indeed any Trustee activities which are not for the benefit of Trust participants. *See* discussion at pp. 4, 16-17 above. Moreover, under federal law (I.R.C. § 408(e)-(f)) and the Trust Agreement, contributions to IRAs and distributions of IRA assets are subject to significant tax-oriented limitations; although assets of an IRA may, under certain conditions, be redirected to another investment option or another IRA trustee, continuous, high-volume Unit redemptions are not expected to occur.

We are aware that the District Court ruling which set aside the *Wells Fargo Decision* did so in part because of doubt regarding the absence of Glass-Steagall hazards present in this type of activity. For example, the court opined that the objectivity of banks' loan decisions and of their investment advice would be as likely to be affected by their promotional interests in this type of fund as by the managing accounts held illegal in *ICI* v. *Camp*, that the possibility of "roll over" or redemption might exert pressure on banks to sell additional units, and that banks might be tempted to advise customers to purchase shares in such funds for reasons other than the comparative merit of available investments. *California Opinion*, 593 F. Supp. at 854-856. The court also feared that the manner in which the funds were offered and marketed prompted Glass-Steagall concerns, because the promotion of such collective investment funds in competition with mutual funds could tend to create a greater "salesman's stake" than do traditional common trust funds. *Id.*, at 856.

Notwithstanding the court's views, however, we continue to believe that collective funds for IRAs of the sort offered by CBT do not raise significant hazards of the sort legislated against in the Glass-Steagall Act and that our conclusion is supported by the fact that Congress intended for this and other types of collective trust vehicles to be publicly promoted. The *California Opinion*, in focusing on the manner in which the trusts are marketed,

rather than on whether they constitute a genuine fiduciary service, disregards the fact that collective investment trusts are regulated under different rules than common trust funds, and that the former may be promoted and marketed freely. In the case of collective investment funds for IRA trusts, however, Congress has spelled out the fiduciary purpose for which the individual IRA trust is established and has assured that that purpose is a genuine one by imposing statutory restrictions on the use or withdrawal of the trust assets for any other reason. Moreover, the strict limits on the amounts that may be contributed to tax-exempt IRA trusts make collective investment trusts of IRA assets inappropriate and impractical for general investment objectives.

In addition, the legislative history of certain 1970 amendments to the federal securities laws made clear the congressional intent that statutory tax-exempt collective investment trusts be promoted and marketed freely. In this regard, the Senate Report, in commenting on the fact that collective investment trusts for "Keogh plan" assets were being exempted from certain provisions of the securities laws but not from others, stated that the reason for not exempting them from the registration provisions of the Securities Act was because interests in such collective trusts would be sold to unsophisticated investors, i.e., publicly marketed.[14] Similarly, the applicability of the federal securities laws to the Trust demonstrates that Congress contemplated that retirement vehicles of this nature would be marketed to the public and thus, wished to impose the disclosure requirements of those laws.

As to the concerns regarding the hazards and abuses at which the Glass-Steagall Act is directed, the *D.C. Opinion*, in affirming the *Citibank Decision*, pointed out that the *California Opinion* was in error in failing to recognize that both Glass-Steagall and

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14. "The amendment does not exempt interests or participation by either *bank collective trust funds* or insurance company separate accounts in connection with 'H.R. 10 Plans,' because of their fairly complex nature as an equity investment and *because of the likelihood that they could be sold to self-employed persons, unsophisticated in the securities field.*" S. Rep. No. 184, 91st Cong. 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4897, 4922 (emphasis added).

ERISA permit collective investment by banks of trust assets held either in "common trust funds" or "common investment funds." *D.C. Opinion*, 596 F. Supp. at 1501. It further held that "the dangers found in *Camp*, which Glass-Steagall was designed to prevent, "*are simply not present in this kind of collective IRA trust asset fund*" (emphasis added). *Id.*, at 1503. Rebutting the fears expressed by *California Opinion*, the *D.C. Opinion*, recognized that the "promotional interests" hazard is non-existent or negligible and the bank has no "salesman's stake" in selling units in such a fund. *Id.*, at 1503. Unlike other types of investments, the Trust is a fidiciary relationship involving tightly regulated and statutorily restricted IRA trust assets. The Trust will be promoted as part of total IRA program offered by CBT, i.e., merely one of several individual retirement options available to its customers, and not as a new and separate collective vehicle for the investment of non-fiduciary assets. The bank's only "stake" here is in selling its service of managing trust assets, a stake it has in every trust situation, whether administered in a common fund or otherwise.

Accordingly, we believe that state and federal legal requirements, as well as the ERISA statutory framework governing IRA trust activities, will substantially control the types of hazards identified in *ICI* v. *Camp*. Similarly, while the Trust Units are, in one sense, freely purchased or redeemed, the tax disincentives built into premature redemptions effectively limit potential promotional pressures on the Bank. In addition, CBT has represented that it will not promote the availability of loans from its credit department for the purpose of funding an IRA.

In sum, the legal nature of the Trust and qualified IRA trust, coupled with the restrictions on the promotion and availability of the trust for general investment purposes, plainly distinguishes the Trust from the type of managed agency collective account vehicle prohibited under the Glass-Steagall Act. *ICI* v. *Camp*, 401 U.S. at 638. As the Supreme Court observed, "[T]here is a plain difference between the sale of fiduciary services and the sale of investments." *Id. See also Citibank Decision*, at 611; D.C.

Opinion, 596 F. Supp. at 1503. The type of service being offered by CBT through the Trust is precisely that contemplated in *ICI v. Camp*, and we conclude that the Trust may operate in compliance with Sections 16 and 21 of the Glass-Steagall Act. While we reach this conclusion fully aware that a similar one was recently challenged, after careful review we continue to be persuaded that our views are correct.

Our conclusion is not affected by the fact that CBT has chosen to register the Trust, and participations therein, with the SEC under the Investment Company Act and Securities Act, respectively. As noted above, CBT has selected this course of action in light of past SEC and SEC staff interpretations regarding the availability of certain exemptions under these statutes for, among other things, common trust funds and collective pension, profit sharing and retirement accounts (and interests in such funds and accounts).[15] Whatever the merits of the SEC's position, which were discussed at length in the *Citibank Decision* (at pp. 11-18), the fact that registration of the Trust may be required under relevant provisions of the federal securities laws does not affect the legality of the Trust's activities under the Glass-Steagall Act. In *Securities Industry Association v. Board of Governors of the Federal Reserve System* ("Becker"), 104 S. Ct. 2979 (1984), which held that the commercial paper marketed by a commercial bank to its customers constituted a "security" within the meaning of sections 16 and 21 of the Glass-Steagall Act, the Supreme Court relied in part on comparable terms used in provisions of the federal securities laws in reaching its conclusions. In so doing, the Supreme Court stated that the federal securities laws, being (along with the Glass-Steagall Act) part of a series of statutory provisions collectively designed to protect the integrity of the nation's financial markets, provided "considerable evidence" as to the meaning of terms used in the Glass-Steagall Act. 104 S. Ct. at 2987. Both the *D.C.* and *California Opinions*, however, have declined to construe this directive to mean that the applicability

15. *See. e.g.*, Section 3(a)(2) of the Securities Act (15 U.S.C. § 77c(a)(2)); Sections 3(c)(3) and 3(c)(11) of the Investment Company Act (15 U.S.C. §§ 80a3(c)(3) and 80a3(c)(11)).

of the federal securities laws to a particular bank activity necessarily must mean that that activity is illegal under the Glass-Steagall Act. *D.C. Opinion*, 596 F. Supp. at 1501; *California Opinion*, 593 F. Supp. at 853.

Further, as has been recognized both by the courts and by the Congress, banks have long been in the business of collectively investing assets held in trust, as well as statutory tax-exempt employee benefit and retirement assets. *See, e.g., ICI v. Camp*, 401 U.S. at 658; *California Opinion*, 593 F. Supp. at 853; *D.C. Opinion*, 596 F.Supp. at 1501; H.R. Rep. No. 1280, 93d Cong., 2d Sess. 316-317 (19740), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5117-8. Under the current scheme of federal securities regulations, however, many of these activities are subject to provisions of the federal securities laws because they involve the purchase or sale or a "security," but are statutorily exempted from the substantive regulatory provision of the securities laws. *See, e.g.*, Securities Act Section 3(a)(2), 15 U.S.C. § 77c(a)(2) (exemptions for interests in a bank-administered common trust fund or interests in certain kinds of statutory tax-exempt employee benefit funds). Inasmuch as banks have been offering these types of collective investment services without significant questions being raised as to their legality under the Glass-Steagall Act, the potential applicability of the federal securities laws to bank common trust and employee benefit activities generally, and to the CBT Trust specifically, does not, in our view, bear on their legality under the Glass-Steagall Act. The mere fact that interests in the Trust qualify as "securities" within the meaning of the securities laws does not mean that they are "securities" forbidden to banks by the Glass-Steagall Act. Such a conclusion would, as the *California Opinion* recognized, invalidate all bank collective investment vehicles. 593 F. Supp. at 853. As the *Becker* decision itself establishes, the prohibitions of the Glass-Steagall Act should not be read to deprive banks of powers which are authorized to them under the national banking laws, 104 S. Ct. 2991, n. 11, and we see no reason in the case of the Trust to permit its legality pursuant to the express authorizations of the

national banking laws and ERISA to be affected by the possible application of federal securities regulatory requirements.

C. Legality of Advertising

We have also separately considered the extent to which the legality of this type of collective investment fund is affected by the manner in which it is marketed. In the *California Opinion*, the court accepted the assertion by plaintiff ICI that the bank had violated the Glass-Steagall Act by advertising its fund to the public. 593 F. Supp. at 855-856. Upon further consideration of the issue, we continue to believe that the promotion of the Trust does not detract for its legality under the Glass-Steagall Act.

CBT proposes to market the Trust by means of an advertisement which promises to "keep track of all of the paperwork," to "take care of everything," and to provide the "best IRA with the investment option that suits your needs." It further says "invest your money any way you like" and list the three available IRA options (see p. 5 above) of which the Collective Investment Trust is last. There is no attempt to highlight the latter or to give it any special emphasis. CBT is not advertising the Trust itself. On the contrary, it is advertising and marketing its entire IRA trust service The advertising of the Trust is used to attract customers to utilize CBT as their IRA trustee. As the *D.C. Opinion* pointed out in upholding the *Citibank Decision*, there is nothing improper about a bank advertising its services to the public. 596 F. Supp. at 1503-1504.[16] Nor is there anything in ERISA, Glass-Steagall, or any other statute which prohibits the marketing of a bank's IRA trust services by the means of publicizing its IRA collective investment funds. The only limitation on advertising any common trust is inapplicable in this case since the Trust consists solely of tax-exempt retirement assets. 12 C.F.R. §§ 9.18(a)(1),(2), (b)(5)(v).

16. *Franklin National Bank v. New York*, 347 U.S. 373 (1954). *See also NYSE v. Smith*, 404 F. Supp. 1091, 1097 (D.D.C. 1975), *vacated on other grounds sub nom. NYSE* v. *Bloom*, 562 F. 2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

Moreover, to hold that advertising or promoting IRA trust services violates Glass-Steagall would totally frustrate the purposes of ERISA. *D.C. Opinion*, 596 F. Supp. at 1504. In enacting ERISA, Congress intended to encourage retirement savings by all classes of the working public at all levels of income. Since the majority of working people cannot be assumed to know all available options permitted by law for management of their retirement assets, it seems evident that only by some sort of public advertising can the general public be made aware of the opportunities available for preparing for retirement. ERISA permits collective investment as the only feasible form for management of small IRA accounts. Without publicity, individual settlors may not be aware of this option. *See also* discussion at pp. 22-24 above.

In effect, what CBT is advertising and selling is a fiduciary service of managing trust assets. Investing these assets collectively is simply the method by which such service must be offered if it is to be economically practicable. Advertising this service is a permissible activity which is neither prohibited by any existing statute nor contrary to any legislative purpose.

Conclusion

Upon extensive analysis of the request and supporting materials submitted by the Bank, we have concluded that the activities of the Trust, as described above and in the materials submitted, represent a bona fide fiduciary service which complies, with the permission granted herein pursuant to 12 C.F.R. § 9.18(c)(5), with the requirements of 12 U.S.C. § 92a and 12 C.F.R. Part 9 promulgated thereunder, and also complies with relevant provisions of the Glass-Steagall Act. Accordingly, for the reasons stated above, it is our opinion that the Bank may lawfully offer this fiduciary service.

/s/ C. T. CONOVER

C. T. Conover
Comptroller of the Currency

Dated 2/7, 1985

[Reprinted]

THE NEW YORK TIMES
MARCH 25, 1984

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The right IRA for you may be Citibank's Portfolio IRA. Citibank's the only bank in New York that offers you this choice. It's an IRA option that allows you the potential to earn higher returns by investing in Citibank managed securities portfolios. You can invest in a bond portfolio, a stock portfolio or other securities portfolios. And you have the flexibility to move from one portfolio to another anytime you want...absolutely free! If you want to be in the securities market, Citibank's Portfolio IRA could be just what the doctor ordered

The Portfolio IRA. Just one of the reasons the Citi never sleeps. Just one more way Citibank is making banking better for you. Because when you bank at Citibank, it's your Citi.

For more information about Citibank's Portfolio IRA, and a prospectus relating to the investment portfolios, including charges and expenses, call the Citibank Tax Shelter Center at 1-800-CITI IRA or 212-750-7733. Or clip the coupon below. Read the prospectus carefully before you invest or send money for the portfolios. The investment portfolios are not obligations of Citibank, are not insured, and are not available in every state.

The Portfolio IRA is a fiduciary service of Citibank offered under the Collective Investments Trust for Citibank IRAs.

Please send me the Citibank Portfolio IRA plan kit including a current prospectus. Clip and send to:
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New York Times March 16, 1986

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Total return for one year ending 12/31/85*

EQUITY	25.85%
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*Past performance is no guarantee of future returns. The Portfolio IRA is a fiduciary service offered under our Collective Investment Trust for Citibank IRAs. The investment portfolios are not available in every state. For more complete information about them, including our management fee and expenses, call or write the Citibank Tax Shelter Center for a current prospectus. Read a portfolio before you invest or send money. The portfolios are not obligations of Citibank and are not insured by the FDIC.

THE NEW YORK TIMES SUNDAY, MARCH 23, 1986

YOU WON'T FIND ANYPLACE IN TOWN THAT CAN OFFER YOU IRAS THE WAY WE CAN. CITIBANK.

Want the potential for higher returns?

Last year The Citibank Equity Portfolio IRA returned 25.85%!* The Portfolio IRA gives you all the advantages of a mutual fund and more. And while the risk is greater than guaranteed return investments like CDs, it's managed by some of our most astute minds in finance—professionals who manage investment portfolios of over $31 billion.

Want to choose your own stocks and bonds?

If you're one of those people who's really on top of the market, you can self direct your IRA in stocks and bonds, Ginnie Maes and Zero Coupon Bonds of your own choosing. You can really grow with our IRA Brokerage Account.

Want an investment with flexibility?

Our Insured Market Rate Account is a great place for IRAs. You have the advantage of our current money market rate, plus the ability to move your money into other accounts.

Want guaranteed returns?

Citibank has just about the widest variety of CDs you'll find, ranging from 3 month through 7 year terms. The longer the term, the more money you make. And the return is guaranteed. And FDIC insured.

Want to manage your IRAs at the touch of a button?

With Citibank Direct Access, you can stay up to the minute on all your IRA and brokerage investments at the touch of a button on your personal computer. You can even add to or change investments at any time you choose.

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Stop in at any Citibank branch. You'll find the kind of financial expertise that will make understanding all the IRA options easy. So you can make the best decision possible about which IRA is best for you.

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More people in town have put more IRA money in Citibank than any other bank. Why? We make it so easy to open or manage any Citibank IRA option, there's no reason to open an IRA anywhere else. Come to Citibank today, or call our toll-free IRA hotline for more information. Because you won't find anyplace in town that can offer you IRAs the way Citibank can.

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NEWS RELEASE

Comptroller of the Currency
Administrator of the National Banks

NR 83-25

Washington, D.C. 20219

For: Release After 9:00 A.M., April 3

Date: April 2, 1984

Remarks by

C. T. Conover
Comptroller of the Currency

Reserve City Bankers Convention
Boca Raton, Florida

April 3, 1984

BOOM OR DOOM: WHAT'S IN THE CARDS FOR COMMERCIAL BANKS?

It's a pleasure to be here today. I would like to talk about something that is extremely important to all of us—what's in the cards for commercial banks.

Today we stand at a crossroads; the path we choose will determine the future of commercial banking. Down one road is the bright promise of competition restored. Down the other is the threat of reregulation and a much smaller market share. Which path will it be, boom or doom? Much of it depends on how banks change their ways in the future.

As some of you are aware, there is one whole side of Congress that wants to turn back the clock and reregulate the financial services marketplace. It would be a big mistake to take their intentions lightly.

In spite of the benefits from removing interest rate ceilings, neither Congress nor consumers have been convinced of the need

for further deregulation. Banks have done a poor job of educating the public about the changes that are occurring. And they have taken too many things for granted.

Customers don't understand that banks have to charge higher fees to cover the increased costs that resulted from interest rate deregulation. Banks don't explain it to them, but somehow expect them to understand anyway. Too many banks change their fee structure and let customers find out about the change the hard way—when they use the service. Other banks don't tell customers how long it will take for a check to clear. And then they wonder why consumers have soured on deregulation.

But the future of commercial banking doesn't have to be bleak. Remember I told you there were two paths. I'd like to take out my crystal ball and describe what the future of commercial banking could be and what it could mean to your customers. Then, I will lay out a plan to help us get to that bright future we all want.

BANKING IN THE YEAR 2000

As I gaze into the crystal ball, I can see that we are in the year 2000. Banks have been given extensive product powers and can branch without restrictions. Other firms have opened consumer banks. Regulation is now based on function rather than charter. So banks, savings and loans, brokerage firms, and insurance companies look very much alike. They offer the same products and services, are regulated by the same regulators, and are competing for the same customers.

The computer has totally changed the role and practice of banking as we know it. Bankers no longer wait for a customer to walk through the door. In fact, extensive networks of brick and mortar branches are obsolete. Instead, banks take advantage of the most modern technology in voice, data, and visual communications. A well-developed network of home terminals is in place that permits consumers to access information at any time of the day or night. Of course, it is possible to transfer funds, purchase stocks or other investments, buy insurance, list real estate, and

secure the most favorable mortgage terms, all without venturing from your living room.

The bank has become the ultimate financial intermediary. Their biggest product is information. They are tied directly into a variety of computerized information networks and can access the latest research data instantaneously.

In fact, through their computer terminals customers have access to virtually all investment tools. Programs are available that rank and rate potential investments based on risk and return and a variety of other variables. The bank can provide business or individual customers with tailor-made lists of possible investment alternatives that meet the specific requirement of their individual investment strategies. These investment instruments include stocks, bonds, mutual funds, time deposits, money market funds, pool of mortgages, business and consumer loans, gold and precious metals, commodities or anything else considered valuable in the year 2000.

I can also see that from this close communication an increased level of customer loyalty has developed. Where customers once went to a dozen different institutions to obtain financial services, they now depend upon a single institution. The bank is the customer's link to tax planning advice, and real estate and insurance activities. Naturally banks even handle equipment leasing, travel and entertainment services, and a variety of other specialized services.

CONSUMERS, BUSINESSES, AND BANKS ARE BETTER OFF

I wouldn't be much of a soothsayer if I couldn't tell you who the winners will be in this new world of financial services. I can see that while banks will benefit, consumers and small businesses are the real winners from this new competition. They are receiving better products and services at better prices and are able to use a more convenient delivery system. Let me describe a few specific ways that they have gained in this new marketplace.

Banks offer cash management services that compete directly with those provided by securities firms. The forces of competition have lowered the minimum deposit requirements and made these accounts available to more consumers and businesses.

Banks originate, package, and sell loans and equity participations to investors. This provides a lot more long term capital for businesses and a lot more jobs. Banks even package small business loans as mutual funds which they privately insure.

With insurance powers, banks also have developed credit insurance for commercial loans. This insurance is an essential part of a flowering secondary market. Banks also provide other flexible insurance products at cheaper rates, and they charge lower real estate fees and cheaper rates for leasing equipment.

To sum it all up, the future for financial services looks like a winning proposition for banks, consumers, and businesses. It is providing more flexible services that better meet everyone's needs.

WHERE WE ARE TODAY

In a real sense, the marketplace is developing along the lines I have just described. Technology is taking on increasing importance each day. One of your strengths is that you realize this better than many of your competitors. But to participate in the fast-paced future I have just described requires action. You will have to find a way to move successfully from the restrictive world of Glass-Steagall, Douglas and McFadden to one where banks are allowed to participate and compete.

OCC HELPS THE TRANSITION

The Comptroller's office has been acting as an agent of change to help ensure that banks can make the transition to this new world of financial services. But we can't do it alone.

Since I became Comptroller, we have been able at least to loosen the choke hold of unnecessarily tight restrictions on commercial banks. We have authorized commercial banks to offer discount brokerage and investment advisory services. We have permitted banks to provide common trust funds for the collective

investment of IRA contributions. We have allowed them to operate futures commission merchant subsidiaries, to lease space to insurance agents, and to provide credit life insurance, and to offer plain English trusts which can broaden the market for trust services.

In addition, we have given banks greater flexibility in structuring loans to meet the needs of the marketplace. We raised the legal lending limit. We have significantly liberalized our real estate regulations. We issued a flexible regulation on adjustable-rate mortgages. We removed portfolio limits and restrictions on loan-to-value ratios and terms to maturity for real estate loans. And we permitted banks to enforce due-on-sale clauses.

Barriers to entry into the financial services system have also been reduced. The procedures for obtaining a national bank charter have been streamlined. The process for forming and acquiring operating subsidiaries has been simplified. And we eliminated or reduced the length, complexity and processing time for many of our applications.

WHAT STILL NEEDS TO BE DONE

But today the job is still only half done. The full benefits of deregulation will only be available to bank customers when banks get added flexibility through new product powers, a removal of geographic barriers, and regulation based on function. Legislation is now being considered that would address each of these areas.

The new Garn Bill would provide you with the new product powers you need to compete with Sears, Merrill Lynch and American Express. At the same time it would complete the process of interest rate deregulation by allowing you to pay interest on demand deposits.

The new Garn Bill would also be a politically realistic first step to interstate banking. It would put the federal blessing on the regional approach to interstate banking.

The recommendations of the Bush Task Force would bring us closer to functional regulation. The Federal Reserve would keep

regulatory authority over the 50 biggest bank holding companies, but other national bank holding companies would be regulated by the same regulator as all national banks. The FDIC would concentrate on deposit insurance; the SEC would regulate bank securities activities; and the Justice Department would handle bank mergers.

All the ingredients are there for a boom in commercial banking. Now you need a plan to make legislative proposals become laws.

A PLAN FOR THE FUTURE

To get what you want, further deregulation, there are three things you're going to have to do.

First, banks have to communicate better. They must keep the public informed about fees, funds availability, and other customer obligations.

Second, the banking industry has to explain the benefits of further deregulation to its customers. Tell them how they will benefit from one-step financial shopping. Let them know that when you have insurance and real estate powers, they will pay lower costs. Explain that by gathering and pooling mortgages and selling mortgage-backed securities, mortgage interest rates will become more competitive. Tell them that you will be able to provide better services for small business. Let them know about all the benefits they stand to gain.

Then, when you have convinced your customers that further deregulation is a good idea, the next step is selling it to Congress. You'll discover that is much easier to do, after you have sold the need for deregulation to their constituents, your customers.

Reregulation may be a dirty word to everyone in this room, but it is also one that none of us can afford to ignore. It's a big dark cloud looming over what could be a bright future. Don't let it rain on your parade.

That's my prescription for success. It's going to take decisive action on your part. Today nobody wants to give the banks anything. If you want further deregulation, you're going to have

to fight for it, and it will be an uphill battle. But it's better than the alternative. So which will it be—boom or doom? It's up to you.

[Reprinted]

NEWS RELEASE

Comptroller of the Currency
Administrator of the National Banks

No. 82-44

Washington, D.C. 20219

Immediate Release

Contact: Leonora S. Cross
(202) 287-4279

October 28, 1982

Dean DeBuck
(202) 447-1800

The Office of the Comptroller of the Currency (OCC) today announced that it has approved an application by Citibank to operate trust funds for the collective investment of assets from individual retirement accounts (IRAs). The OCC said the offering of this fiduciary service will benefit the public by providing new investment opportunities for IRA holders.

The OCC said that national banks have authority to collectively invest IRA trust assets under its trust regulations and provisions of ERISA. It also stated that the Glass-Steagall Act was not an impediment to the offering of this fiduciary service.

Under the plan, Citibank would act as trustee of the individual IRAs. It would be directed to invest the IRA assets in one or more trust funds maintained by the bank. It intends to register the funds with the Securities and Exchange Commission under the Investment Company Act and to register the offering of interests in the funds under the Securities Act. As trustee, the bank would also act as investment adviser and perform other services for the funds.

Because some requirements of the Investment Company Act and the Securities Act might conflict with certain provisions of the OCC's trust regulations, the bank asked the OCC to waive those provisions to permit compliance with the securities laws. The OCC said that although it was not clear that there would be

any conflict with these regulations, it would waive those provisions, and the application was approved.

[Reprinted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

C. T. CONOVER, COMPTROLLER OF THE CURRENCY, *et al.*,
Defendants.

Civil Action No. C-84-0742
Hearing: August 24, 1984 11:00 a.m.

DEFENDANTS' MOTION TO FILE OVERSIZE BRIEF

Defendants, by their undersigned attorneys, move this Court to enter the attached Order permitting them to file a reply brief in further support of their Motion to Dismiss or, in the Alternative, for Summary Judgment, and in opposition to plaintiff's Cross-Motion for Summary Judgment, which exceeds the normal length established by Rule 220.4 of this Court. This action raises the issue whether national banks may in the exercise of their fiduciary powers establish and maintain collective investment trust funds for the purpose of collectively investing assets received by such banks as trustees of Individual Retirement Account ("IRA") trusts. The issue involves complex legal questions about banking institutions and the banking statutes. Plaintiff and defendants agree that this is an issue of great significance not only to the two banks involved here but also to the entire banking industry and the nation's financial community. A full briefing should aid the Court in resolving this important issue. The granting of this Motion is therefore warranted and in the interests of justice.

Wherefore, defendants respectfully request that this Court grant this Motion and enter the attached Order.

Respectfully submitted,
RICHARD K. WILLARD
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney
/s/ SANDRA M. SCHRAIBMAN

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[Reprinted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

INVESTMENT COMPANY INSTITUTE,

Plaintiff,

v.

C. T. CONOVER, *ET AL.*,

Defendants.

Civ. No. H-85-160 (JAC)

FEDERAL DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO QUESTIONS POSED BY THE COURT

Question 1: Does the failure of Congress to enact a law that would authorize an activity preclude an administrative agency from giving approval to that activity in absence of legislation?

The answer is that an administrative agency may allow an activity encompassed by proposed but unenacted legislation, so long as the activity does not contravene existing legislation. In that regard, later proposed but unenacted legislation is a poor guide to the intent of a former Congress (and thus of existing legislation). *See, Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497, 503 (D.C. Cir. 1968).

Even more significantly, the proposed but unenacted legislation on which plaintiff relies is irrelevant to the case at bar. That proposed legislation would have given banks authority to engage generally in the mutual fund business, *i.e.* to offer a pooled fund to the public as an investment vehicle alone, free from the limitations, restrictions, mandated purpose and protections that inhere in tax-exempt employment trusts eligible for participation in a collective investment trust. That Congress has not enacted such general mutual fund legislation has no effect whatsoever, legal or logical, on the permissibility of a collective investment trust.

Question 2: Does CBT's voluntary registration of the Collective Fund with the Securities and Exchange Commission provide evidence of registrability and/or is it akin to an estoppel preventing CBT from arguing that the Collective Fund is not subject to the requirements of the Securities Act?

In response to this question, we would first emphasize that the Comptroller in no way argues that the Collective Fund, and interests therein, are not subject to registration under the securities laws.[1] Thus, he is perfectly willing to accept the conclusion that they are subject to registration, whether because the law so provides or because CBT's actions have made them so.[2]

The point relevant to this action is that the status of interests in the Collective Fund as "securities" under the *Securities Act*—whether exempt or non-exempt, registered or unregistered—does not render them the "securities" forbidden to banks by the Glass-Steagall Act. Several factors demonstrate the inescapability of this conclusion:

1. Most obviously, interests in collective investment trusts for Keogh plan assets are not only "securities" within the meaning of the Securities Act, but also are (unless exempt under some other provision) *registered* under that Act, pursuant to deliberate Congressional mandate. *(See, Federal Defendants' Memorandum*

1. The SEC has advised the Comptroller that it is its position that the Collective Fund is subject to registration under the Investment Company Act and that interests in the Collective Fund are subject to registration under the Securities Act. It takes no position as to whether these registrations, or any other factor, cause the Collective Fund to run afoul of the Glass-Steagall Act, because this is solely a matter of banking law interpretation. If the Court is inclined to make a determination on whether the Collective Fund and interests therein are required to be registered under the federal securities laws, an issue which the SEC does not believe is properly before the Court, the SEC respectfully requests permission to be heard on this issue.

2. It is true that, in his Citibank ruling, the Comptroller did question the applicability of the registration provisions to IRA collective investment trusts. This discussion was in no way material to the decision. In all the Comptroller's IRA rulings and in all filings made in court to defend those rulings, the Comptroller has taken the position that, whether or not IRA collective investment trusts are subject to registration under the securities laws, they do not violate the Glass-Steagall Act.

in Support of Motion for Summary Judgment at 22-23, 30-32). This does not render them "securities" for Glass-Steagall Act purposes or in any way cause such collective investment trusts to run afoul of that Act. Thus, registration is not and cannot be a factor causing a collective investment trust to be illegal.

2. ERISA's own legislative history shows that Congress contemplated that IRA collective investment trusts would or could

[Reprinted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2623

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

v.

C. T. CONOVER, AS COMPTROLLER OF THE CURRENCY, ET AL.,
Defendants-Appellants,

and

WELLS FARGO BANK, ET AL.,
Defendants-Intervenors-Appellants.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE

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April 1, 1985

Since Individual Retirement Accounts ("IRAs") were created by the Employee Retirement Income Security Act of 1974, and most especially since IRA's were made more widely available after 1981, commercial banks represented by the American

Bankers Association have been among the principal trustees holding such accounts for the American public. In order to achieve maximum efficiency in the administration of IRA trusts, and thus provide the greatest rate of return to IRA owners and their beneficiaries, it is desirable to commingle the assets of many individual accounts in a common trust or common investment fund. Such a procedure is specifically authorized by section 408(a)(5) of the Internal Revenue Code. The Comptroller of the Currency has approved the applications of several national banks to do precisely what the law authorizes—commingle the assets of various Individual Retirement Accounts in a common fund for investment. This case is one of three currently pending legal challenges to the Comptroller's actions. The commingled IRA account program of Citibank, N.A., was challenged unsuccessfully in the United States District Court for the District of Columbia, *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984), but the case is now on appeal. In the court below, the similar programs of Wells Fargo Bank and Bank of California was successfully challenged, *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and litigation over the commingled IRA account program of Connecticut Bank & Trust Co. remains pending in the United States District Court for the District of Connecticut. *Investment Company Institute v. Conover*, Civil Action No. H-85-160 JAC (D. Conn. filed Feb. 26, 1985).

Obviously, therefore, this is an issue of nationwide importance to the banking industry. If the decision of the district court is upheld in this case, it would deprive commercial banks in this Circuit of the opportunity to offer a valuable service to their customers, deprive those customers of the benefits to be realized from that service and cast substantial doubt upon the ability of commercial banks outside this Circuit to offer the service.

[Reprinted]

Cases Nos. 84-2622, 84-2623

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

v.

C. T. CONOVER, Comptroller of the Currency; OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendant-Appellants,

and

WELLS FARGO BANK, N.A.;
and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors-Appellants

OPENING BRIEF OF DEFENDANTS APPELLANTS AND DEFENDANTS INTERVENORS—APPELLANTS

Appeal from the United States District Court for the Northern District of California Honorable William W Schwarzer, Judge District Court No. C-84-0742-WWS

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[material omitted]

on the advertising of common trust funds. Like Regulation F after the 1955 amendment, it does not impose these restrictions on collective investment trusts.[9]

3. ERISA and Individual Retirement Accounts

As noted, collective investment trusts consist solely of assets of tax-exempt employment-related trusts. Prior to 1974, only two general types of such trusts were authorized by the tax laws: those exclusively for the benefit of employees, and those established by and for self-employed individuals, called "Keogh" or "H.R. 10" plans. In 1974, Congress created another employment related trust, the IRA trust.[10] This was accomplished by ERISA, which added Section 408 to the Internal Revenue Code ("IRC"). ERISA was designed to encourage all working people to establish IRA's and to offer these individuals the same type of benefits and opportunities available to employee and Keogh plans.

9. Regulation 9, as originally promulgated in 1963, omitted the requirement that commingled trusts be established for "bona fide fiduciary purposes"; and did, however, impose restrictions on the advertising of common trust funds and collective investment trusts alike. In 1972 the Comptroller amended the Regulation to rescind advertising and publicity restrictions with regard to collective investment trusts. Such restrictions still apply to common trust funds. 37 *Federal Register* 24161 (1972).

10. ERISA defines an IRA as a "trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries," pursuant to a "written governing instrument" meeting certain requirements. IRC § 408(a). An IRA can also be established as a custodial account, but only if the account fulfills all the other requirements for an duties imposed on an IRA trustee. Such an account is "treated as a trust" and the custodian "treated as the trustee thereof." IRC § 408(h). Even so, such accounts may not be commingled by a bank because the assets are not received in trust. Since the IRA's in issue are all trusts, the custodial account provisions are irrelevant.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

vs.

C. T. CONOVER, Comptroller of the Currency; OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendant-Appellants,

and

WELLS FARGO BANK, N.A.;
and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors-Appellants.

Nos. 84-2622
84-2623

PARTIAL TRANSCRIPT OF ELECTRONIC TAPE RECORDINGS
MONDAY, AUGUST 12, 1985

REPORTED FROM ELECTRONIC TAPE RECORDING BY: CLINT MILLER

[material omitted]

created these investments or supervisory committees and we have quite an argument here that the effect of that is to dilute the role of the bank as trustee and in effect result in delegation of trust powers arguably to a supervisory committee which does not act in the same trust fiduciary responsibility.

Let me ask this question, since you're talking about ERISA. In Section 408 it's clear from reading 408 A5 in conjunction with 408 A2 that Congress contemplated that banks as trustees would have common investment funds, would be commingled as funds for investment purposes. My question of you is, if this Court, and I guess perhaps ultimately the Supreme Court, were to agree with the District Court in this case rather than the District Court in

the District of Columbia, would the banks be through, would the banks just be prohibited flatly from collectively investing IRA accounts?

MR. SULLIVAN: I think not.

THE COURT: How would they do it without running afoul of the law or running afoul of Glass-Steigel?

MR. SULLIVAN: It comes down to advertising. I think if they had them, kept them in the back room where someone got after some significant contact with the bank, that the person could ultimately learn about the product and could get into it.

THE COURT: Okay, that's one thing, but let's suppose the real reason for the Court's decision is the existence of the supervisory committee, not the promotion, then where are you?

MR. SULLIVAN: Well, I would—

THE COURT: Let's suppose that ultimately the Supreme Court were to decide that fine, it makes perfectly good sense to permit the banks to advertise the range of options available to IRA investors. All right, so we get that, but wait a minute, we decide that you are not really selling trust services because you have diluted your role as trustee by organizing these supervisory committees and we are having difficulty now distinguishing these collective investment trusts from the traditional mutual funds, which we said were subject to Camp, then where are you?

MR. SULLIVAN: I think we're at a point where the particular form has been undercut so the bank in this particular form can't do that, it would have to go back and obtain an exemption or perhaps not be able to offer it if the exemption was granted without registering, going through an elaborate process, but the point is, and, Your Honor, I would suggest a different interpretation on the dilution, as you call it—

THE COURT: I want to stick with the question that I have, you haven't really answered it, Counsel. Let me

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5019

INVESTMENT COMPANY INSTITUTE,
Appellant,

v.

C. T. CONOVER, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

In accordance with the provisions of Rule 29 of the Federal Rules of Appellate Procedure, the American Bankers Association hereby respectfully petitions the Court for leave to file the attached Brief as Amicus Curiae in support of the Appellees. The American Bankers Association is the largest national trade association of the commercial banks in the United States, including banks chartered by the Comptroller of the Currency ("national banks") and those chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia.

Since Individual Retirement Accounts ("IRAs") were created by the Employee Retirement Income Security Act of 1974, and most especially since IRA's were made more widely available after 1981, commercial banks represented by the American Bankers Association have been among the principal trustees holding such accounts for the American public. In order to achieve maximum efficiency in the administration of IRA trusts, and thus provide the greatest rate of return to IRA owners and their beneficiaries, it is desirable to commingle the assets of many individual accounts in a common trust or common investment fund. Such a

procedure is specifically authorized by Section 408(a)(5) of the Internal Revenue Code. The Comptroller of the Currency has approved the applications of several national banks to do precisely what the law authorizes—commingle the assets of various Individual Retirement Accounts in a common fund for investment. This case is one of three currently pending legal challenges to the Comptroller's actions. The commingled IRA account program of Citibank, N.A., was challenged unsuccessfully in the Court below, *Investment Company Institute v. Conover,* 596 F. Supp. 1496 (D.D.C. 1984). The similar programs of Wells Fargo Bank and Bank of California were successfully challenged in *Investment Company Institute v. Conover,* 593 F. Supp. 846 (N.D. Cal. 1984), and that case is now on appeal. Litigation over the commingled IRA account program of Connecticut Bank & Trust Co. remains pending in the United States District Court for the District of Connecticut. *Investment Company Institute v. Conover,* Civil Action No. H-85-160 JAC (D. Conn. filed Feb. 26, 1985).

Obviously, therefore, this is an issue of nationwide importance to the banking industry. If the decision of the district court is reversed in this case, it would deprive commercial banks of the opportunity to offer a valuable service to their customers and deprive those customers of the benefits to be realized from that service.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Appellant,

v.

C. T. CONOVER,
COMPTROLLER OF THE CURRENCY, *et al.*,
Appellees.

No. 85-5019
Wednesday, December 11, 1985
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 10:15 a.m.

BEFORE:

CIRCUIT JUDGES SCALIA AND STARR.
(Senior Circuit Judge McGowan is also a member of this panel and will consider the case on the briefs and the tape recording of the oral argument.)

APPEARANCES:

HARVEY L. PITT, ESQ., Fried, Frank, Harris, Shriver & Jacobson, Suite 1000, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037; on behalf of Appellant

L. ROBERT GRIFFIN, ESQ., Office of the Comptroller of the Currency, Washington, D.C.; on behalf of Appellee, Comptroller of the Currency

[material omitted]

does?

MR. PITT: Well—

QUESTION: And I cannot imagine that the case is not such an important one that it bears a petition for certiorari to the Supreme Court. The Court is going to turn it down until there is a circuit conflict.

MR. PITT: I think Your Honor is correct, that this case we do perceive as being sufficiently important that a circuit conflict may not be necessary, although—

QUESTION: And either side is going to go up from the Ninth Circuit.

MR. PITT: I would assume that.

QUESTION: Has the case been argued incidentally in the Ninth Circuit?

MR. PITT: The case has been argued in the Ninth Circuit. It was argued on August 12th before Judges Norris, Reinhardt, and Coughenour who is a District Judge sitting by designation. The case is under submission. I might add, Your Honor, that after the initial decision came down from Judge Schwarzer in the Central District of California, we did two things. We asked the Comptroller if he would refrain from issuing additional rulings until we could get this issue resolved in the courts. We also sought to reach an agreement on the form of some kind of stay of proceeding and there was over the telephone an

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86-1520

Supreme Court, U.S.
FILED
AUG 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,

Petitioner,

v.

ROBERT L. CLARKE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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1201R

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5.	Letter from H. Joe Selby, Senior Deputy Comptroller for Bank Supervision, Comptroller Of The Currency, to John H. McGuckin, Jr., Bank Of California, N.A. (Jan. 31, 1984)	67a
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7.	New York Times Citibank Advertisements dated March 25, 1984, March 16, 1986, March 23, 1986.	91a
8.	Comptroller Of The Currency News Release, *Boom or Doom: What's In The Cards For Commercial Banks?* (Apr. 3, 1984)	94a
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* The documents set forth in this Appendix, as well as all typographical errors contained therein, have been reproduced verbatim.

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10. Excerpt from Defendants' Motion To File Oversized Brief, *Investment Company Institute* v. *C.T. Conover*, C.A. No. C-84-0742 (N.D. Cal. filed Aug. 24, 1984) 103a

11. Federal Defendants' Supplemental Memorandum In Response To Questions Posed By The Court, *Investment Company Institute* v. *C.T. Conover*, C.A. No. H-85-160 (JAC) (D. Conn. filed Mar. 1985) 105a

12. Excerpt from Motion For Leave To File A Brief And Brief Of The American Bankers Association As Amicus Curiae, *Investment Company Institute* v. *C.T. Conover*, No. 84-2623 (9th Cir. filed Apr. 1, 1985) 108a

13. Excerpt from Opening Brief of Defendant's Appellants and Defendants Intervenors-Appellants, *Investment Company Institute* v. *C.T. Conover*, Nos. 84-2622, 84-2623 (9th Cir. filed Apr. 1, 1985) 110a

14. Excerpt from Partial Transcript Of Electronic Tape Recordings Monday, August 12, 1985, *Investment Company Institute* v. *C.T. Conover*, Nos. 84-2622, 2623 (9th Cir.) 112a

15. Excerpt from American Bankers Association Motion For Leave To File A Brief As Amicus Curiae, *Investment Company Institute* v. *C.T. Conover*, No. 85-5019 (D.C. Cir. filed May 1, 1985) 114a

16. Excerpt from Oral Argument Dated December 11, 1985, *Investment Company Institute* v. *C.T. Conover*, No. 85-5019 (D.C. Cir.) 116a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5019

INVESTMENT COMPANY INSTITUTE,

Appellant

v.

C.T. CONOVER, COMPTROLLER OF THE CURRENCY, *et al.*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-0549)

Argued December 11, 1985

Decided May 20, 1986

Harvey L. Pitt, with whom *Henry A. Hubschman* and *David M. Miles* were on the brief for appellant.

L. Robert Griffin, Attorney, Office of the Comptroller, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice and *Richard V. Fitzgerald*, Chief Counsel, Office of the Comptroller were on the brief for appelles, C.T. Conover, et al.

Arnold M. Lerman, with whom *Michael S. Helfer, Christopher R. Lipsett* and *Daniel M. Drory* were on the brief for appellee, Citibank.

John J. Gill and *Michael F. Crotly* were on the brief for amicus curiae, American Bankers Association urging affirmance.

Before: SCALIA and STARR, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: This case brings us once more into the legal battle between the banking and securities industries over the former's movement into business domains which the latter

considers its own. The Investment Company Institute is a national association of investment companies, investment advisors and underwriters. The Institute brought an action for declaratory and injunctive relief in the District Court, challenging a decision by the Comptroller of the Currency allowing Citibank to establish and market a "Collective Investment Trust" for assets of Individual Retirement Accounts, commonly known as "IRAs." The Institute contended that Citibank's Trust is functionally equivalent to a mutual fund, and that Citibank could not operate the Trust without running afoul of the 1933 Glass-Steagall Act. That Act was designed to preserve public confidence in commercial banks like Citibank by keeping them out of the securities business.

The District Court granted the Comptroller's motion for summary judgment, *Investment Co. Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984), and the Institute appealed. The sole issue before us is whether "units of beneficial interest," or shares, in Citibank's Trust constitute "securities" within the meaning of sections 16 and 21 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (Seventh), 378(a)(1) (1982) ("the Act"). The Comptroller concluded that the units are not "securities" for purposes of the Act, and that Citibank could therefore lawfully offer the units to the public. The District Court agreed with the Comptroller, thereby disagreeing with the then only other judicial decision on this issue, *Investment Co. Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984) (Schwarzer, J.), *appeal pending*, Nos. 84-2662/2663 (9th Cir.).[1] Guided by the deference principles enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984), we uphold the Comptroller's interpretation of the Act and affirm.

1. Subsequent to the District Court's decision, the U.S. District Court in Connecticut agreed with the court below, holding that Citibank's Trust does not run afoul of the Glass-Steagall Act. *See Investment Company Institute v. Clarke*, Civil No. H 85-160 (D. Conn. Jan. 21, 1986) (Cabranes, J.), *aff'd mem. per curiam*, No. 86-6033 (2d Cir. May 2, 1986).

I

An understanding of the specific dispute before us requires familiarity with a portion of the elaborate federal statutory scheme governing national banking activities and the newer provision of federal law permitting IRAs, an acquaintance with the structure of Citibank's Trust, and an appreciation of the procedural history of this case.

A

Enacted in the shadows of the 1929 stock market crash and the ensuing banking collapse, the Glass-Steagall Act prohibits national banks from engaging in the securities business. Section 16 of the Act forbids national banks to underwrite or deal in "securities or stock." 12 U.S.C. § 24 (Seventh).[2] Section 21 in turn prohibits anyone in the business of underwriting, selling, or distributing "stocks, bonds, debentures, notes or other securities" from taking deposits. 12 U.S.C. § 378(a)(1).[3] The term "securities," however, is left undefined by the Act. The leading

2. Section 16 provides in relevant part:

> The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock.

12 U.S.C. § 24 (Seventh) (1982)

3. Section 21 provides in relevant part:

> [I]t shall be unlawful—
>
> (1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor.

12 U.S.C. § 378(a)(1). Section 20 of the Act does, however, permit certain corporate affiliations between national banks and securities companies. 12 U.S.C. § 377.

Supreme Court case construing that term, *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971), overturned an earlier ruling by the Comptroller allowing Citibank to operate a "collective investment fund." *Camp* held, in brief, that the "units of participation" in Citibank's fund constituted "securities" within the meaning of the Act because, in the Court's view, contributions to Citibank's fund were made for "investment" purposes rather than true fiduciary purposes, and because Citibank's arrangement would likely pose several of the hazards to the banking system that Glass-Steagall was designed to eliminate. *See* 401 U.S. at 630-38.

Also of relevance in this case is the Employee Retirement Income Security Act (ERISA), enacted by Congress at 1974. Among other things, ERISA added a provision to the Internal Revenue Code permitting qualified individuals to deduct investments in IRAs from taxable income up to a specified amount, currently $2,000 annually. 26 U.S.C. § 408(a)(1) (1982). Such contributions, together with earnings on IRA assets, are not taxed until distribution or withdrawal, *id.* § 408(d) (1), but a ten percent tax penalty is imposed if the account holder withdraws the funds before reaching the age of 59½, *id.* § 408(f) (1). Section 408(a)(2), moreover, requires specific approval by the Secretary of the Treasury before a bank or other institution may serve as trustee for IRA trust assets. These assets may only be commingled in a common investment fund or trust fund. *Id.* § 408(a) (5).

B

In 1982, Citibank established a common trust fund for IRA investors. A common trust fund is a device, long known to the banking industry, by which a bank commingles the assets of individual trusts and invests those assets collectively. The assets of each participating trust are exchanged for an undivided ownership interest in the common trust fund, with the ownership interest being proportionate to the assets contributed by each trust to

the fund's total assets. This device obviously permits each participating trust to enjoy greater diversification and wider investment opportunities than would otherwise exist. It also permits banks, acting as trustees, to manage trusts that are too small to be managed individually. National banks have operated such funds since at least 1936, when the Federal Reserve Board specifically authorized their establishment. *See* 1 Fed. Reg. 417, 420 (1936) (amending Regulation F).

Styled a "Collective Investment Trust," the Citibank trust fund at issue here consists of four separate investment portfolios into which an individual may instruct Citibank to place his or her IRA trust assets. This is accomplished by means of a written trust agreement, which is freely revocable save for the ten percent penalty imposed by I.R.C. § 408. An individual's ownership interest in the entire trust fund is expressed in terms of "units of beneficial interest," which are available only to Citibank IRA-holders and are non-transferable. IRA assets may, however, be freely transferred among the four portfolios, as well as among any of Citibank's other IRA programs. Citibank serves as trustee and investment advisor to the trust fund and receives a monthly fee based in part on the net value of the fund's portfolios. In order to comply with SEC requirements, however, Citibank has placed the fund under the ultimate control of an independent five-member "supervisory committee," which essentially serves as a board of directors. Citibank has marketed its fund as an alternative to, or a competitor of, similar programs now being offered by mutual funds.

C

Citibank first sought approval of its Collective Investment Trust from the Securities and Exchange Commission, which has in the past opined that ownership interests in collective trust funds are "securities" for purposes of the federal securities laws. Although not conceding the correctness of the SEC's interpretation, Citibank registered the Trust as an investment company under the Investment Company Act of 1940, and registered the

units of beneficial interest as securities under the 1933 Securities Act.[4]

Citibank then sought approval of the Trust from the Comptroller of the Currency, who has statutory responsibility for regulating fiduciary activities of national banks. 12 U.S.C. § 92a (1982). Citibank asked the Comptroller to determine that its operation of the Trust did not violate the Glass-Steagall Act; it also asked for exemptions from those regulations that Citibank feared might conflict with requirements imposed by the SEC pursuant to the Investment Company Act.

On October 28, 1982, the Comptroller issued a final ruling approving the Citibank Trust. J.A. at 174. The Comptroller found Citibank's operation of the Trust to be authorized by applicable trust regulations and granted the requested exemptions. Importantly for present purposes, the Comptroller provided a lengthy analysis of the applicability of the Glass-Steagall Act to the Trust, concluding that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." *Id.* at 180.

Much of the Comptroller's discussion of the Glass-Steagall Act centered on the Supreme Court's 1971 decision in *Camp*. After noting certain "general similarities" between the present Trust and the Citibank fund at issue in *Camp*, the Comptroller offered two reasons why the units of beneficial interest in the Trust should not be considered "securities" for purposes of Glass-Steagall. *First*, unlike the arrangement in *Camp*, Citibank receives the IRA assets *in trust* rather than in a "managing agent" capacity. The Comptroller observed that, as *Camp* had recognized, national banks have long enjoyed authority to commingle funds received in trust. *See id.* at 179. In light of this long established authority, the Comptroller concluded that "when, as in the present case, the 'securities' merely represent the formal manifestation of a traditional banking service, . . . the prohibitions of the Glass-Steagall Act are not applicable." *Id.* at 180. According to the Comptroller, moreover, "the meaning of the term securities

4. Citibank asserts that these actions were taken merely to avoid a potentially expensive, protracted dispute with the SEC.

under the securities law [is] not necessarily synonymous with its meaning under the Glass-Steagall Act." *Id.*

Second, the Comptroller concluded that Citibank's operation of the Trust entails none of the "hazards and potential abuses" identified by the Supreme Court in *Camp*. The Comptroller explained in detail his reasons for so believing, concluding that "because the potential for abuse is non-existent or negligible here, and because this is essentially a traditional banking service, it would be inappropriate to conclude that there is any security here for purposes of the Glass-Steagall Act." *Id.* at 182.

The Institute then brought this action for declaratory and injunctive relief. Granting the Comptroller's cross-motion for summary judgment, the District Court held that the Comptroller's decision was entitled to "great weight," and that the Comptroller had acted reasonably in interpreting Glass-Steagall as not prohibiting Citibank's Trust. It is from this adverse decision that the Institute appeals.

The Institute's principal argument is that Citibank's Trust is flatly prohibited by *Camp*. We address this contention first. After concluding that the Trust is not forbidden by Camp's teaching, we analyze the Comptroller's ruling under the governing legal framework as set forth in *Chevron*. The latter discussion also address the Institute's two remaining contentions, namely that ERISA does not authorize Citibank's operation of its Trust and that the District Court improperly deferred to the Comptroller's statutory interpretation.

II

Despite our ultimate determination that *Chevron's* deference principles govern, we first examine the Institute's vigorously pressed contention that *Camp* itself disposes of this case, requiring invalidation of Citibank's latter-day efforts to compete with the mutual fund industry. As we understand its argument, the Institute asserts two independent grounds for this position. First, *Camp* makes it unlawful for national banks to operate a mutual fund, which, the Institute contends, is exactly what the Trust

amounts to. Institute Brief at 1-2; Reply Brief at 1 Second, under *Camp*, the term "security" includes any "undivided and redeemable interest in the assets of a common trust fund." Institute Brief at 19; Reply Brief at 3.

A

The strength of the Institute's first argument lies in its intuitive appeal, for *Camp* indeed overturned the Comptroller's earlier attempt to authorize Citibank's operation of what amounted to a mutual fund. Now Citibank—again with the Comptroller's approval—is attempting to offer a service that, in the eyes of many customers and, apparently, Citibank's marketing and advertising departments, looks very much like a mutual fund. To call Citibank's fund anything but a mutual fund, according to the Institute, is to exalt form over substance.

In our view, however, *Camp* cannot fairly be read to prohibit any financial service that some actors in the marketplace view as functionally similar to a mutual fund. *Camp* nowhere states that all such services are prohibited. To be sure, the Court found significant the fact that the fund at issue there was "in direct competition with the mutual fund industry." 401 U.S. at 625. But the mere existence of such competition was not the decisive element in the Court's analysis.

More fundamentally, Citibank's Trust is, upon close analysis, quite distinct from the fund at issue in *Camp*. As the Comptroller found, the principal difference is that Citibank serves as trustee of its IRA funds rather than as managing agent, the situtation before the Court in *Camp*. Although the Institute devotes considerable energy to arguing why this distinction is irrelevant, *see, e.g.*, Institute Brief at 11-12; Reply Brief at 3, *Camp* itself suggests otherwise. After expressly observing that "the investment fund plan as established does not provide that the bank receives the investor's money in trust," 401 U.S. at 622 n.8, the Court stated:

> For at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the

> banking laws, commingle trust funds on the one hand, and act as managing agent on the other. No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character.

401 U.S. at 624-25. According to the Court, then, it was the *combination* of the bank's commingling of trust assets *and* its acting as managing agent (rather than trustee) that spawned Glass-Steagall concerns. Here, by contrast, Citibank is seeking to exercise only one of the two powers which *Camp* held could not be joined: the power to commingle trust funds. The existence of a trust relationship is sufficient, by itself, to take this case out of *Camp's* express teaching.

But even if the investment fund at issue in *Camp* had employed a trust device, our case would still not be on all fours. *Camp* evinces the Court's concern with the risks to which a national bank might subject itself in offering a new, unconventional product. In the Court's analysis, whether such a product is a "security" depends to some extent on whether, from the bank's perspective, the product entails the relatively small risks presumably characteristic of commercial banking or, as in *Camp*, the relatively large risks (either real or apparent) usually associated with investment banking. *See* 401 U.S. at 629-33, 636-38. This concern also appears to underlie the Camp Court's attempt to determine whether a financial service represents a "fiduciary" service or a run-of-the-mill "investment." *See* 401 U.S. at 621,638. The Court in *Camp* was constrained to undertake an analysis of economic effects since, as discussed more fully below, the Comptroller in that case had not bothered to shed any light whatever as to Glass-Steagall's meaning. *See* 401 U.S. at 626-27. In order to determine whether *Camp* controls this case,[5] we

5. Again, in the case at hand, we have the benefit of the Comptroller's analysis and reasoning under Glass-Steagall. What follows in the

are obliged to examine some of the economic effects of Citibank's Trust.

We see four reasons why, from a banking perspective, the Citibank Trust is likely to be less risky than the investment fund at issue in *Camp*. First, customers of the *Camp* investment fund were permitted to invest between $10,000 and $500,000. 401 U.S. at 622. Here, by contrast, ERISA imposes a limit of $2,000 per person per year. 26 U.S.C. § 408(a)(1). This limitation, it seems to us (as it seemed to the Comptroller), makes it less likely that Citibank would be tempted to engage in unsound lending practices in order to attract retain particularly valued customers. This was one of the "subtle hazards" identified in *Camp*. *See* 401 U.S. at 632, 637-38.

Second, Citibank's units may not be used as collateral, unlike the investment fund shares in *Camp*. This, again, is assured by ERISA. *See* 26 U.S.C. § 408(e)(4). One would expect this limitation to reduce Citibank's risk by preventing it from selling its units "on the margin," that is, financing a portion of the purchase price with a loan secured by the shares. Margin selling was, of course, one of the lending abuses widely thought to have contributed to the unhappy events of 1929.

Third, unlike the investment fund shares in Camp, Citibank's units are non-transferable. *See, e.g.*, J.A. at 50 (Citibank prospectus). This restriction naturally impedes formation of an independent "market" in the units, and thereby allows Citibank more control over the aggregate size of the Trust. For example, if Citibank decides that its Trust is becoming too risky, or is perceived by the public as too risky, the bank can gradually scale down the program by the simple expedient of diminishing its marketing efforts and retiring any units presented for redemption. By contrast, if the units were transferable, owners wishing to trade their units for cash could do so by selling them to a third party rather than redeeming them at Citibank.

Finally, the ten percent income tax penalty imposed by ERISA for early redemption would seem to reduce the risk that Citibank

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text is our analysis of the Institute's argument that *Camp* itself entirely controls this case.

will be called upon to redeem large numbers of units at any one time. This was another concern animating the Court in *Camp*. The Court feared that, if confronted with such circumstances, "a bank might find itself under pressure to rescue the fund through measures inconsistent with sound banking." 401 U.S. at 637.

For all these reasons, we believe the Trust at issue here is distinguishable in significant respects from the managing-agent fund in *Camp*.

B

The Institute's second argument under *Camp* is less plausible. The Institute cites that case for the proposition that the term "security" necessarily includes any "undivided and redeemable interest in the assets of a common trust fund." Institute Brief at 1-2; Reply Brief at 3. *Camp* will be searched in vain for any statement of this sweeping proposition. The Institute has arrived at this understanding by splicing together unrelated phrases from different parts of the *Camp* opinion. This effort, albeit creative, is unavailing.

The Institute's argument, moreover, proves far too much. If the term "security" were indeed interpreted as broadly as the Institute's suggests, then any ownership interest in a bank's common trust fund would constitute a security, and all commingling of trust funds by national banks would be effectively prohibited. We are at a loss to determine how a national bank could pool the assets of various trusts without creating some kind of certificates or other instruments setting forth the ownership interests of each of the participating trusts in the common trust assets. But such commingling, as we have seen, has historically been permitted and is clearly sanctioned by *Camp*. *See* 401 U.S. at 624-25.

For the foregoing reasons, we conclude that *Camp* does not dictate the result demanded by the Institute here. This conclusion does not, of course, mean that the decision is in any wise to be ignored. To the contrary, as the discussion which follows demonstrates, *Camp* informs our analysis of whether the Comptroller's

interpretation of Glass-Steagall can be upheld under the principles enunciated in *Chevron*. We turn now to that analysis.

III

Over the years, the Supreme Court has frequently stated that courts should defer to reasonable interpretations of statutes by the administrative agencies charged with their administration. A generation ago in the landmark case of *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *Id.* at 131. The Court observed that the agency's interpretation should be accepted as long as it has " 'warrant in the record' and a reasonable basis in law." *Id.* In another leading case, *Red Lion Broadcasting Company Co. v. FCC*, 395 U.S. 367 (1969), the Court stated that an agency's interpretation "should be followed unless there are compelling indications that it is wrong," *id.* at 381.

Notably, the *Camp* majority reaffirmed this principle. The Court's declination to defer to the Comptroller signaled no departure from this settled principle, but was occasioned instead by the Comptroller's complete silence as to the meaning of the governing statute. That is to say, there was in *Camp* no explicit interpretation of the Glass-Steagall Act to which the Court could appropriately defer. The court's comments in this respect are highly instructive:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. . . .
>
> The difficulty here is that the Comptroller adopted no expressly articulated position at the administrative level as

> to the meaning and impact of the provisions of §§ 16 and 21 [of the Glass-Steagall Act] as they affect bank investment funds. The Comptroller promulgated Regulation 9 without opinion or accompanying statement.

401 U.S. at 626-27 (citation omitted). This statement suggests a fundamental difference between this case and *Camp*. Here, in the administrative proceedings, the Comptroller provided a thorough, explicit interpretation of Glass-Steagall as it applies to this case. We are therefore duty bound, as *Camp* teaches us, to give "great weight" to that interpretation.

Subsequent to *Camp*, the Supreme Court has provided more specific guidance on the application of deference principles. The most important decision for our purposes is *Chevron*, which set forth a now familiar framework for analyzing interpretations of statutes by agencies charged with their administration. First, the court must determine whether Congress "has directly spoken to the precise question at issue." *Id.* at 2781-82. This inquiry entails an examination of the statute and, if necesary, resort to the pertinent legislative history. If Congressional intent is unclear after this interpretative exercise, then the reviewing court is called upon to determine whether the agency's interpretation is "permissible," that is to say reasonable. *Id.* at 2783. If it is, then the agency's interpretation must stand.[6]

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6. The Supreme Court has explicitly applied this analytical framework at least four times since *Chevron was decided*. *See Chemical Mfrs. Ass'n v. NRDC*, 105 S. Ct. 1102 (1985) (upholding EPA interpretation of Clean Water Act, thereby permitting EPA to grant variances from the EPA's effluent limitations by showing that effluent sources were "fundamentally different" from other effluent sources within a particular EPA category); *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 445 (1985) (upholding interpretation of Clean Water Act by the Army Corps of Engineers forbidding construction on wetlands without prior approval by the Corps); *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986) (rejecting interpretation of Bank Holding Company Act by Federal Reserve Board in the face of clearly expressed congressional intent); *United States v. City of Fulton*, 106 S. Ct. 1422 (1986) (upholding interpretation of Flood Control Act of 1944 by Secretary of Energy).

A

In applying the first prong of the *Chevron* analysis, the inquiry before us is whether the framers of Glass-Steagall intended to prohibit national banks from engaging in activities like that at issue here. Although both the Comptroller and Citibank vigorously urge us to consider *ERISA's* legislative history, that history is not relevant here for two reasons: *first*, in enacting ERISA, Congress in no wise purported to amend Glass-Steagall; *second*, nothing in ERISA or its legislative history suggests that Congress as a whole had any view, let alone a clear intent, on the applicability of Glass-Steagall to the operation of IRA collective trusts by national banks. Any inferences that might be drawn from ERISA or its legislative history "cannot substitute for a clear expression of legislative intent" by the framers of the Glass-Steagall Act itself. *See Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979).

1

In applying the first part of the *Chevron* analysis, we must first look to the language of the statute itself. Inasmuch as the term "security" is not defined in the Act, we must " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Securities Industry Ass'n v. Board of Governors*, 104 S. Ct. 2979, 2986 (1984) (Becker) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The Institute urges us simply to borrow the definition used in the federal securities laws. Under this view, any instrument registered as a security with the SEC would be considered a security for Glass-Steagall purposes.

The Institute relies heavily upon the Supreme Court decision in *Becker, supra*, for this argument. There, the issue was whether the term "security" includes commercial paper, which all parties to that litigation agreed is simply an unsecured promissory note. The Court held that commercial paper falls within the plain meaning of the term "note," since the term "security" explicitly includes all notes, commercial paper is therefore a "security."

See 104 S. Ct. at 2986-88. The Institute interprets *Becker* as holding that SEC registration itself constitutes "considerable evidence" that the instruments at issue are "securities" within the meaning of Glass-Steagall. Institute Brief at 20.

Fairly read, however, Becker does not stand for this proposition. To be sure, the Court found that *Congress'* explicit inclusion of commercial paper as a "security" for purposes of the securities laws was an indication that Congress considered commercial paper to be a "security" for Glass-Steagall purposes as well. But the Court did not indicate that SEC registration by itself bears on the classification of a financial instrument as a "security" within the meaning of the banking statute.[7] Nor did *Becker*, as the Institute suggests, hold as a general matter that the term "security" itself has an ascertainable ordinary meaning in all contexts.[8] As already noted, the majority opinion in *Becker* relied primarily on the plain meaning of the term "note," not on the plain meaning of the term "security."[9]

As we see it, the statutory language is of limited help in divining Congressional intent in this case. The term "security" clearly encompasses instruments like stocks, bonds, notes, and mutual fund shares, which have traditionally been underwritten and marketed by members of the securities industry. As *Camp* teaches,

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7. As the Becker dissent pointed out, the definition of the term for securities law purposes should be different from that used in a Glass-Steagall analysis because (1) "the purposes of the banking and securities laws are quite different," and (2) some instruments, for example, bankers' acceptances, are securities for purposes of the securities laws but "plainly do not constitute securities under the Glass-Steagall Act." 104 S. Ct. at 2999-3000 (O'Connor, J., dissenting). Nothing in the majority opinion contradicts these specific points; the Court, rather, divided over the clarity of congressional intent as to commercial paper's falling within the statutory terms "note" or "security." *See infra* n.9.

8. Indeed, the *Becker* dissent explicitly stated that it does not. *Id.* at 2994.

9. Although the *Becker* opinion stated that the "ordinary meaning of the terms 'security' and 'note' as used by the 1933 Congress encompasses commercial paper," 104 S. Ct. at 2987, the Court did not articulate any broad definition of the term "security." Rather, it relied upon the plain meaning of the *statutory* definition which, as we have seen, clearly encompasses "notes," and hence commercial paper. *See* 104 S. Ct. at 2986-88.

moreover, the term may include other financial interests that are functionally equivalent to these traditional kinds of securities. But, as we have also seen, the term cannot be interpreted to include *all* financial interests in assets or in a business venture, lest traditional common trust funds be rendered invalid. Although interests in Citibank's Trust share some of the features of traditional mutual fund shares—for example, they permit diversification of risk and can be widely marketed—they are, as we have seen, quite different from traditional mutual fund shares in several important respects. Obviously, interests in IRA trust funds did not exist in 1933 when Congress passed Glass-Steagall; the term Congress employed to identify the financial instruments it had in mind, moreover, is not sufficiently precise as to clearly encompass such interests.

2

Unfortunately, the legislative history is also of limited usefulness in illuminating Congress' intent. The Institute has uncovered only two relevant aspects of Glass-Steagall's legislative history, both of which have been discussed in prior Supreme Court decisions.

The first is that, as noted in *Camp*, the Glass-Steagall Act was in part the product of Congressional investigations into the activities of bank security affiliates, including their operation of investment trusts. *See* 401 U.S. at 635. The Court reasoned that, "[s]ince Congress generally intended to divorce commercial banking from the kinds of activities in which bank security affiliates engaged, there is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust." *Id.* (footnote omitted).

Camp did not, however, hold that the term "security" includes interests in any kind of fund consisting of pooled assets. It held, rather, that Congress intended to prohibit the kind of investment fund at issue there, which the Court believed was nearly identical to the investment funds operated by bank security affiliates in the pre-Depression era. IRA trusts, with all the limitations imposed

by ERISA, did not exist, of course, in 1933. More to the point, as we have already discussed, Citibank's Trust is much less like a traditional mutual fund than was the investment fund at issue in *Camp*. We are not persuaded that Congress' concern with the activities of banks' securities affiliates would extend to the kinds of ERISA-related activities at issue here.

The second potentially relevant aspect of legislative history is the fact, noted in *Becker*, that in drafting the Glass-Steagall Act Congress rejected a regulatory approach in favor of a set of "flat prohibitions," thereby evincing a desire to "separat[e] as completely as possible commercial from investment banking." 104 S. Ct. at 2985. The Institute seems to interpret this as an indication that national banks should be prohibited from intruding onto what the securities industry considers its own turf. The Institute reasons that since many mutual funds have been offering their own IRA trusts, *see* Institute Brief at 10 n.16, prohibiting Citibank's entry into the field would be in keeping with Congress' apparent desire to keep commercial banking separated as much as possible from investment banking.

The problem with this argument, however, is that it is not entirely clear who is intruding onto whose turf. It is true, as we have already observed, that Citibank's fund represents something of a departure from the traditional role of a commercial bank in that it allows small account holders to benefit from the diversification that was previously available only to relatively large customers of the bank's trust department. But operation of an IRA trust by a mutual fund, which necessarily puts the mutual fund in the position of serving as trustee of its customers' money, also would seem to represent something of an intrusion into the traditional domain of commercial banking. Citibank's Trust, then, like the IRA trust offered by mutual funds, falls somewhere between the traditional activities of commercial and investment banking.

B

Having concluded that Congress has not "spoken to the precise question" before us, we must determine whether the Comptroller's interpretation of the Glass-Steagall Act is reasonable. Although the Supreme Court has provided limited specific guidance on how a court is to go about making such a determination, we can discern in *Chevron* and other Supreme Court decisions some general principles to guide us.

The overriding principle is that as long as Congress has no clearly discernible intent on the point in question, it is the agency which is vested with primary responsibility for interpreting the statute. *Chevron* teaches that Congress may delegate interpretative authority implicitly—by failing to legislate in sufficient detail as to resolve a particular question of interpretation—or explicitly—by expressly leaving a gap for the agency to fill. *See* 104 S. Ct. at 2782. In either case, interpretative authority has been delegated to the agency, not to the court.[10]

This broad principle has two corollaries. First, an agency interpretation may be reasonable even if it is one which the court would not have rendered had it been interpreting the statute in the first instance. 104 S. Ct. at 2782 n.11; *Chemical Manufacturers, supra,* 105 S. Ct. at 1108. Obviously, the court must not simply "rubber stamp" the agency interpretation or transform deference into "judicial inertia." *See Bureau of Alcohol, Tobacco, and Firearms v. FLRA, supra,* 464 U.S. at 96-97. But

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10. The judiciary must, of course, determine whether such a delegation has occurred. As this court recently stated:

> [P]roperly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation.

State of Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984) (emphasis in original) (citations omitted). In this sense, then, interpretation of a statute remains "quintessentially a judicial function." *See Bureau of Alcohol, Tobacco and Firearms v. FLRA,* 464 U.S. 89, 98 n.8 (1983). But this interpretative responsibility is discharged once the court has completed the initial phase of the *Chevron* analysis.

the reviewing court may not simply substitute its own reading for that of the agency.

Second, an agency interpretation may not be branded as unreasonable simply because the court doubts the wisdom of the policy choice embodied in the agency's interpretation. *Chevron*, 104 S. Ct. at 2793. It is true, as the Institute points out, that a court must reject administrative interpretations that "frustrate the policy Congress sought to implement." *Becker*, 104 S. Ct. at 2983 (quoting *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981)). But to be true to *Chevron*, a court can lawfully overturn an agency interpretation on this ground only if the Congressional policy is sufficiently clear, and the agency's interpretation so inconsistent with that policy, that the court can conclude that Congress' clear intent has been violated. Absent a violation of clear Congressional intent, it is for the agency, not the reviewing court, "to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved." *Chevron*, 104 S. Ct. at 2793.

C

With these principles in mind, we turn in the final phase of our analysis to an examination of the Institute's attack on the reasonableness of the Comptroller's interpretation. We observe first that the Comptroller, in determining whether ownership interests in Citibank's Trust constitute "securities" for Glass-Steagall purposes, employed the analytical framework fashioned by the Supreme Court in *Camp*. The Comptroller first analyzed the transaction to determine whether Citibank would be receiving funds for a true fiduciary purpose; he then examined the transaction in light of each of the Congressional concerns identified in *Camp*. *See* Ruling at 8-11. On the basis of that analysis, the Comptroller concluded that the units of participation are not "securities" and that the Act's prohibitions are therefore inapplicable. Since the Comptroller's analytical framework was the

very one employed in *Camp*, we find that framework, needless to say, eminently reasonable.

The Institute, however, challenges the Comptroller's application of this framework. It first contends that the Comptroller erroneously found Citibank's Trust to have a *bona fide* fiduciary purpose. Second, according to the Institute, the Comptroller erroneously concluded either that the Trust did not raise the Congressional concerns identified in *Camp* or, alternatively, that he could adequately address those concerns through the exercise of his regulatory powers.

I

The Institute advances two distinct reasons why it believes Citibank's Trust represents an investment rather than a fiduciary service. First, according to the Institute, the Comptroller granted an exemption to his own "fiduciary regulations," allowing Citibank to vest management of the fund in an independent supervisory committee. According to those regulations, a common trust fund must be under the "exclusive management" of the sponsoring bank. *See* 12 CFR § 9.18(12) (1984).

To be sure, the existence of a non-bank supervisory committee renders the Trust at issue here more akin to a traditional mutual fund.[11] Yet the regulations at issue merely prescribe standards or requirements for collective investments by national banks; they do not purport to define when a particular service will be deemed "fiduciary" in nature. More fundamentally, vesting control over the Trust in an independent supervisory committee does not dilute the legal effects of the bank's fiduciary obligations to its IRA customers. This arrangement might make it more difficult for Citibank to discharge its trusteeship obligations, and Citibank's delegation of control might conceivably be alleged

11. We note again that Citibank's Trust is directed by a non-bank supervisory committee only because, according to Citibank, it is required to do so by virtue of the SEC's interpretation of federal securities laws. Citibank also contends, as already pointed out, that it complied with the SEC's requirement only to avoid a protracted legal battle with that agency, a not uncommon tactic in the arena of securities regulation.

under some circumstances in this litigious age to constitute a breach of its fiduciary obligations. But the relationship between the bank, as trustee, and the IRA-holder, as beneficiary of the trust, remains intact. This feature, we are satisfied, does not take the Citibank Fund out of the domain of "fiduciary" services and propel it into the mutual fund business.

Second, the Institute points out that Citibank is not merely commingling assets of pre-existing trusts, but is actively marketing its Trust to the public as an investment. According to the Institute's interpretation of a 1940 Federal Reserve Board regulation cited in *Camp*, this aggressive marketing campaign disqualifies the Trust as a *bona fide* fiduciary service. *See* 26 Fed. Reserve Bull. 393, 394 (1940).

We agree with the Institute that, in light of *Camp's* concern with "promotional pressures," *see* 401 U.S. at 630-38, Citibank's marketing strategy might provide one indication that its Trust falls on the wrong side of the line between investments and *bona fide* fiduciary services. We cannot agree, however, that this consideration is dispositive in this case. The passages of the 1940 regulation in which the Institute relies were not themselves quoted or cited in *Camp*, and we have discerned no indication that the Supreme Court intended to elevate this regulation to the status of binding precedent. Quite apart from the regulation itself, the Comptroller carefully considered each of the promotional pressures that Citibank's marketing strategy might arguably create, and concluded that in this case those pressures are not sufficiently strong to warrant concern. *See* J.A. at 138-84. This evaluation seems to us eminently reasonable.

Finally, we do not believe that Citibank's characterization of the Trust as an "investment opportunity" should bear on whether the Trust constitutes a *bona fide* fiduciary service. The two terms are not mutually exclusive. Any fiduciary service is also an investment opportunity if by that one means an opportunity to earn a return on one's money; very few customers would likely be satisfied with the services of a bank's trust department if the bank

did no more than safekeep their funds. We agree with the Comptroller that the proper inquiry is whether the bank is offering a genuine fiduciary service in addition to an opportunity to earn a return. Banks can appropriately provide more than vaults and safety deposit boxes and still remain faithful to the demands of federal law.

In sum, we cannot say that the Comptroller unreasonably determined that Citibank's Trust represents a *bona fide* fiduciary service. Not only is the Comptroller much better situated than we are to make such determinations, but his thorough justification of his conclusion is quite reasonable.

2

The Institute contests the Comptroller's treatment of the potential economic hazards of Citibank's Trust on a number of grounds. It first advances an argument which it successfully asserted in the California litigation, *see* 593 F. Supp. at 856, namely that the Comptroller's findings exhibit a disagreement with Congress and the Court in *Camp* about the potential dangers of entry by commercial banks into the investment banking business. *See* Institute Brief at 21-22. In our view, this is not a fair reading of the Comptroller's opinion. Rather, that opinion reflects a belief that this particular arrangement does not raise the concerns identified in *Camp*, and that the arrangement is therefore not the kind of activity Congress intended to proscribe through Glass-Steagall's prohibitions.

The Institute next argues that the Comptroller simply dismissed all of the potential dangers identified in *Camp* based upon a belief that his general regulatory power under 12 U.S.C. § 92(a) and other statutes would be sufficient to curb any abuses that might arise. Institute Brief at 22. Upon analysis, this is likewise a mischaracterization of the Comptroller's ruling. The Comptroller nowhere even mentions 12 U.S.C. § 92(a), and does not rely upon any general regulatory power in minimizing the importance of the dangers identified in *Camp*. Rather, the Comptroller points to specific, existing regulations that would

obviate some of those dangers. For example, one regulation relied upon by the Comptroller, 12 C.F.R. § 9.18(b)(8)(i) (1982), prevents Citibank from lending money to the Trust itself or to any individual participant. Fairly read, the Comptroller's decision does not run afoul of *Becker's* teaching that a bank regulator may not rely upon its general regulatory powers in order to circumvent the "broad prohibition" of the Glass-Steagall Act. *See* 104 S. Ct. at 2988.

The Institute's remaining arguments reflect, at bottom, disagreement with the Comptroller's judgment about the potential economic effects of Citibank's Trust on Citibank and on the banking industry.[12] We concede the apparent plausibility of the Institute's view. On the other hand, the Comptroller has advanced plausible reasons for his view that such concerns are misplaced in this particular instance given the entire set of circumstances before him. Any assessment of the dangers foreseen by the Institute would involve judgments about complex economic phenomena related to the banking industry. Congress has charged the Comptroller with making those judgments in the first instance. We may overturn the Comptroller's judgments only if they are unreasonable. We are unable to conclude that they are.

Affirmed.

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12. The Institute advances an additional argument unrelated to these economic effects, namely that the Comptroller's action "subverts the legislative process." *See* Institute Brief at 42-44. The Institute observes that members of the banking industry have unsuccessfully sought legislation that would explicitly permit the kind of service at issue here. Thus, according to the Institute, "the Comptroller simply and unlawfully has attempted, by administrative fiat, to 'enact' the very legislation Congress repeatedly has refused to enact. *Id.* at 17.

In our view, however, these facts do not establish that the Comptroller has in any way subverted the legislative process. Elementary principles of law teach that current legislative activity is irrelevant in determining, as we must under *Chevron*, whether Congress in 1933 expressed any clear intent with respect to the issue before us or, if it do not, whether the Comptroller's interpretation of Congress' language is reasonable. Congress, moreover, remains free to address the issue if it finds itself in disagreement with the actions of the Comptroller or the courts.

[Reprinted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE,

Plaintiff,

v.

C.T. CONOVER, *et al.*,

Defendants.

Civil Action No. 83-0549

OPINION OF THE HON. CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

INTRODUCTION

This action for declaratory and injunctive relief challenges an October 28, 1982, final Ruling (the "Ruling") issued by the Comptroller of the Currency (the "Comptroller") which approved a plan by Citibank, N.A., to establish a "Collective Investment Trust" for individual retirement account (IRA) trust assets exempt from taxation under the Employee Retirement Income Security Act ("ERISA"), 26 U.S.C. § 408. Plaintiff Investment Company Institute is a national association of open-ended investment companies, their investment advisors, and principal underwriters. Plaintiff claims that the Ruling allows Citibank to establish a "mutual fund" in direct contravention of the prohibitions against banks becoming involved in the sale and marketing of securities found in the Glass-Steagall Banking Act of 1933 ("Glass-Steagall"), 48 Stat. 162 (codified as amended in various sections of 12 U.S.C.), one of several depression-era pieces of legislation designed to restore and maintain public confidence in financial institutions. Defendants counter that Citibank's Common Investment Trust, as authorized by the Comptroller's Ruling, is not a prohibited mutual fund, but a common trust fund which does not violate the strictures of Glass-Steagall, and which is in any event specifically authorized by

statute in ERISA. There being no genuine issue of material fact present in this case, the parties have filed cross-motions for summary judgment.

STATUTORY AND REGULATORY BACKGROUND

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"). As part of ERISA, the Internal Revenue Code was amended to add § 408, which permits qualified individuals to deduct from taxable income up to a specified amount (currently $2,000 annually, not to exceed 100% of salary), I.R.C. § 408(a)(1). Such tax-deductable contributions and earnings on trust assets are not taxed until they are distributed or withdrawn. *Id.*, § 408(d)(1). Withdrawals are not permitted until the individual establishing the account dies or reaches the age of 59½, without a 10% tax penalty being imposed. I.R.C. § 408(f)(1). In addition, § 408(a)(2) requires that only banks and other institutions which receive specific approval of the Secretary of the Treasury may serve as trustees for IRA trust assets. These IRA trust assets may only be commingled in a common trust fund or common investment fund. I.R.C. § 408(a)(5).

In addition to the statutory framework laid out by ERISA, there is another regulatory scheme applicable to this case. 12 C.F.R. § 9.18 contains the Comptroller's regulations relating to the establishment and operation of collective trusts by national banks with trust powers. Under these regulations, a national bank acting as trustee, or in a similar capacity, may invest funds held in that capacity in a common trust fund. 12 C.F.R. § 9.18(a)(1). Similarly, 12 C.F.R. § 9.18(a)(2) permits a national bank acting in a fiduciary capacity for retirement or similar trusts exempt from federal taxation to invest collectively any funds so received. Retirement fund assets may also be invested in common trust funds. 12 C.F.R. § 9.18(b)(2).

Finally, the Glass-Steagall Act provides that national banks are forbidden to engage in the securities business. Section 16 of Glass-Steagall provides that national banks shall not underwrite

or deal in "securities or stock." 12 U.S.C. § 24 (Seventh). Section 21 of the Act in turn prohibits any person in the business of selling, underwriting or distributing "stocks, bonds, debentures, notes or other securities" from engaging "at the same time to any extent whatsoever" in the business of taking deposits, except to the extent premitted in Section 24 of the Act. 12 U.S.C. § 378(a)(1). The term "securities" is not defined anywhere in Glass-Steagall.

FACTUAL BACKGROUND

In 1982, Citibank, which serves as trustee for IRA trusts, applied to the Comptroller to establish a common trust exclusively for IRA trusts for which it is trustee. This common trust is entitled the Collective Investment Trust for Citibank IRAs ("CIT"). It establishes optional portfolios into which an individual may, by way of a written Trust Agreement with Citibank, require the bank to place his IRA trust assets. The CIT is one of several options which an IRA settlor may choose when selecting Citibank as IRA trustee. Such Trust Agreement is freely revocable subject to the penalty provided for in I.R.C. § 408. However, assets may be freely transferred between portfolios within the CIT, as well as between any of Citibank's other IRA trust options, free from penalty. The purpose of the CIT is to provide an opportunity for the individual small IRA trust to be combined with assets of many other IRA trusts to create a sum large enough to allow the kind of diversification and professional financial management which it otherwise would be unable to obtain.

The interest of each IRA trust in the CIT is expressed by "units of beneficial interest." These units are available only to IRA trusts of which Citibank is trustee and are not transferable. There is no charge for the acquisition or withdrawal of these units. Citibank acts as trustee and investment advisor of the CIT and receives a monthly fee based partly on the net value of the CIT's portfolios.

The Securities and Exchange Commission has at various times stated its opinion that the units of interest in collective funds such

as the one in issue here are securities within the meaning of the federal securities laws. Citibank, while not conceding that the Commission is correct on this point, and without raising that particular issue here, filed registration statements with the Commission to have the CIT registered as an investment company under the Investment Company Act of 1940, and to register the units of beneficial interest as securities under the 1933 Act. Citibank asserts that this was done merely to avoid a long and costly exemption proceeding before the Commission.

Citibank then sought approval of the CIT from the Office of the Comptroller. In its application, Citibank asked for a ruling that the CIT did not violate the prohibition against national banks marketing securities, found in §§ 16 and 21 of Glass-Steagall. In addition, Citibank asked to be exempted from those parts of the Comptroller's regulations which might be in conflict with those of the Investment Company Act.

THE COMPTROLLER'S RULING

On October 28, 1982 the Comptroller issued a detailed and reasoned final Ruling which approved the Citibank CIT as being lawful under 12 C.F.R. Part 9 and not in conflict with the proscriptions of Glass-Steagall. The Comptroller initially determined that the CIT was a proper exercise of Citibank's fiduciary powers under either 12 C.F.R. § 9.18(a)(1) or (a)(2). The CIT was found to fall under the former provision because the assets invested therein are received and held by Citibank in trust. The latter provision was found also to apply as the trust assets invested in the CIT are retirement plan assets. (Ruling 4-5). Next, the Comptroller found that such a collective investment of IRA trust assets was specifically authorized by ERISA. (R. 8). The Ruling went on to state the Comptroller's finding that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." (R. 9).

In so finding, the Comptroller distinguished this case from that presented in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("Camp"). In that case, the Comptroller had

approved a commercial bank's plan for the collective investment of managing agency funds not held by the bank in trust. *Id.* at 622. The Supreme Court invalidated the Comptroller's ruling, holding that such a collective investment of managing agency assets held by a national bank violated Glass-Steagall's prohibition against national banks issuing, marketing or underwriting securities. The Comptroller found that the "most significant difference" between the invalid fund in *Camp*, and the Citibank CIT was that the latter involves assets held in trust, which would render it lawful under the Supreme Court's analysis in *Camp*. (R. 10). The Comptroller found that the CIT is "the formal manifestation of a traditional banking service," i.e. trust activities, (R. 15), unlike the service offered in *Camp*. Finally, the Comptroller concluded that the hazards which the Supreme Court noted in *Camp* as being behind the necessity for the prohibitions in Glass-Steagall, were "non-existant or negligible in the context of commingled IRA trusts." (R. 12).

For the reasons set forth in discussion which follows, this Court declines to invalidate the Comptroller's Ruling. Instead, it is the opinion of this Court that the Comptroller acted reasonably when he made his Ruling. The Citibank CIT does not violate the Glass-Steagall Act in that the units of beneficial interest are not "securities" under that Act, and the same holding enunciated in *Camp*, which Glass-Steagall was intended to prevent, are simply not present in this case, the CIT presents no other violations of the Act, and, finally, the collective investment of IRA trust assets is specifically authorized by ERISA.

D. THE COMPTROLLER'S CAREFUL AND REASONED DECISION IS ENTITLED TO GREAT WEIGHT.

Plaintiff would have this Court accord little weight to the Comptroller's interpretation of Glass-Steagall. As support for this contention, plaintiff points to *Securities Industry Association v. Board of Governors*, U.S. , 104 S.Ct. 2979 (1984) ("Becker"). In that case, however, the Supreme Court, while invalidating the sale of commercial paper by a national bank as

being a "security" under Glass-Steagall, held that the Court accords "substantial deference" to an interpretation by an administrative agency charged with administering the Act "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Becker, supra* at 2983; *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In *Camp*, the Supreme Court held that this principal of according great deference to any reasonable construction of a regulatory statute by the agency charged with the statute's enforcement finds particular application to the Comptroller of the Currency in regards to the Glass-Steagall Act. *Id.* at 626-27, *NYSE v. Smith*, 404 F.Supp. 1091, 1096 (D.D.C.1975). This was reiterated in *Securities Industry Ass'n v. Board of Governors,* U.S. , 104 S.Ct. 3003, 3009 (1984), decided the same day as *Becker*. Nothing in *Becker* acts to change this principal as applied to the Comptroller. The Court finds that the Comptroller's interpretation was indeed reasonable, and will be accorded the weight it so deserves.

Plaintiff then points out the language in *Becker* which admonishes against *post hoc* rationalizations by counsel, specifically those in *Becker* involving some of the same arguments put forth by counsel in the present case. Defendant apparently would have the Court consider most, if not all, of the defendants' arguments to be *post hoc*, and therefore entitled to little or no weight. The Court is not persuaded by plaintiff's view of the holding in *Becker*. Unlike the present case, the counsel in Becker was advancing an argument not present in the agency ruling. The Supreme Court justifiably limited its consideration to only those arguments put forth in the Ruling itself. Here, there are no *post hoc* rationalizations being thrust upon this Court, merely detailed arguments raised and answered by the Comptroller in his Ruling. *See, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962). Therefore, the Court declines to ignore any of the defendants' arguments based upon the plaintiff's interpretation of *Becker*.

II). THE COMPTROLLER ACTED REASONABLY IN INTERPRETING GLASS-STEAGALL AS NOT PROHIBITING THE COLLECTIVE INVESTMENT FUND PROPOSED BY CITIBANK.

a) The "units of beneficial interest are not "securities" under Glass-Steagall.

The Comptroller's Ruling found that the units of beneficial interest in the Citibank CIT were not "securities" under the Glass-Steagall Act. Plaintiff argues that the Comptroller was in error in this interpretation. As the definition of "securities" exists nowhere in Glass-Steagall itself, the issue, as noted above, is whether the Comptroller's interpretation was reasonable in light of the purpose and intent of the statute. *Becker, supra.* Initially, plaintiff argues that since the CIT and its units of beneficial interest have been registered with the SEC, that in effect acts as an admission by Citibank that they are dealing in the marketing of securities. This argument is without merit. Although it is clear that the term "securities" is broadly enough defined by the securities laws to encompass interests in common trust funds, *See,* 15 U.S.C. § 77b(1), it is also equally clear that not all such funds are to be considered securities for Glass-Steagall purposes. *Camp, supra,* 401 U.S. at 638. The Court in *Camp* drew a distinction between trust assets received "for a true fiduciary purpose rather than for investment," *Id.*, the former being exempt from the Act. Thus, it does not necessarily follow that the mere fact of registration under the securities laws is proof that the fund or interest so registered is a security for Glass-Steagall purposes.

The distinction drawn in *Camp,* between fiduciary purpose and investment, formed the crux of the holding in *Investment Company Institute v. Conover, et al.*, No. 84-0742 (slip op. N.D. Cal. August 28, 1984) ("ICI"). In that case, plaintiff was challenging a separate but identical Ruling by the Comptroller authorizing two California banks to offer the same service involved in this case. The Northern District of California found the funds in that case to be soley for the purpose of investment and invalidated the

Comptroller's Ruling. Plaintiff would have this Court do the same here. However, this Court believes, with great respect for the careful analysis shown by the Court in *ICI*, that the conclusion there was in error. By focusing only on whether the funds in question fit into the mold of a "common trust fund," the Court in *ICI* failed to recognize that both Glass-Steagall and ERISA permit collective investment by banks of trust assets held either in "common trust funds" or "common investment funds." I.R.C. § 408(a)(5). Such "investment" of assets of statutory tax exempt retirement plans is a traditional banking function, as evidenced by the Comptroller's own long-standing regulations, 12 C.F.R. § 9.18 *et seq.*, and the legislative history of ERISA.

ERISA itself is clear on this point, allowing the commingling of IRA trust assets in either a common trust or a common investment fund. I.R.C. § 408(a)(5). Such funds have long been considered traditional banking services for retirement assets, and there is a clear indication that Congress fully intended IRA assets to be "invested" in this manner. The Conference Report on ERISA, quoted in part by the Court in *ICI*, goes on to state that "the conferees intended that, for the purposes of diversification of investments, the assets of qualified individual retirement accounts may be pooled with the assets of qualified § 401(a) trusts. . ." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 337 (1974). Thus, Congress evidenced its intention that IRA trusts were to be treated by banks in accordance with their recognized authority to collectively invest other statutory retirement plan assets. The legislative history of ERISA goes on to show Congress' explicit understanding that it is "common practice for banks . . . . to maintain pooled investment funds for [retirement] plans." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 316. Thus, it is clear that the funds invalidated by the Court in ICI, and at issue here, were considered by Congress to be a natural extension of traditional banking activities and therefore the units of beneficial interest are not "securities" in violation of Glass-Steagall.

b) Glass-Steagall does not prohibit a National Bank from establishing collective investment trusts for IRA trust assets.

As noted above, Glass-Steagall prohibits national banks from marketing, issuing, or underwriting any issue of security or stock. 12 U.S.C. § 24. Conversely, Glass-Steagall also forbids anyone "in the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatsoever in the business of receiving deposits." 12 U.S.C. § 378(a)(1). In short, banks are not to be involved in the securities field and those involved in the securities field are not to act as traditional banks. The Comptroller, using his expertise as the agency administrator responsible for the application of the Act, and in a carefully reasoned and crafted Ruling, interpreted this to mean that Glass-Steagall poses no impediment to the Citibank CIT. The Court, as discussed fully below, finds this interpretation reasonable, and will not overturn it.

Initially, the forgoing discussion relating to funds such as these being considered by Congress to be a natural extension of traditional banking functions is dispositive in and of itself. Glass-Steagall says banks must act like banks alone. Here, Congress has shown its recognition that the collective investment of IRA trust assets is to be considered the same as pooled investment of other types of retirement plans, which have always been considered to be a tradional banking function. *Camp, supra* at 638. *See also*, H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 316 (1974).

Here, Citibank is selling its fiduciary services, consistant with its authority under ERISA. There is no sale of prohibited "investments," due to the fiduciary nature of the IRA trust. *Camp*, supra at 624-25. ERISA imposes upon Citibank a set of fiduciary duties and obligations which ensure that Citibank is engaged in a proper banking and fiduciary service. Unlike the fund struck down in *Camp*, the Citibank CIT is bound by the restriction set forth in ERISA on all IRA trusts. These restrictions assure that Citibank cannot serve simply as a vehicle for

investment, as was the case in *Camp*. These restrictions, as the Comptroller noted in his Ruling, include restrictions on self-dealing of various sorts, I.R.C. § 408(a)(5); requirements of reports and accounting, I.R.C. § 408(i); and provisions which prevent a bank as trustee from causing any forfeiture of IRA trust assets. I.R.C. § 408, *et seq*. In addition, the IRA settlor himself is constrained by various statutory restrictions such as the $2,000.00 limit on tax-free investment per year. I.R.C. § 408(d), and the %10 tax penalty for withdrawal of IRA assets before reaching the age of 59½. I.R.C. § 408(f). In sum, there exists a strong statutory framework which ensures the fiduciary nature of the Citibank CIT. The Comptroller acted reasonably when he relied on this in his Ruling.

c) The "hazards" which Glass-Steagall was designed to prevent are not present in the Citibank Collective Investment Trust.

The Supreme Court in *Camp* enunciated several "hazards" which the Glass-Steagall Act was designed to prevent. Based on the purpose of the Act, the Supreme Court concluded that the managing agency account in *Camp* was replete with these very hazards and struck down the ruling. The Comptroller's Ruling distinguished the Citibank CIT from the managing agency account in *Camp*, noting that the "fiduciary services being considered here do not present the hazards and potential abuses that Congress sought to avoid when it enacted the Glass-Steagall Act." (R. 9). The Court holds that the Comptroller acted reasonably in making this finding.

In *Camp*, the Supreme Court noted that "[t]he hazards that Congress had in mind were not limited to the obvious danger that a bank might invest its own assets in frozen or otherwise imprudent stock or securities investments." *Id*. at 630. What Congress was also focusing on were some of the more "subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary . . . . and enters the investment banking business." *Id*. Included in the list of "hazards" Glass-Steagall was intended to prevent are the risk of a bank making unsound loans, to its "affiliate" or to others connected with the investment; that a

bank's "reputation for prudence and restraint" would be lent to its securities business, thus glossing over the risks inherit in such endeavors; and, finally, the risk that a bank's "promotional interest" would lead to an inability to give its customers sound and impartial financial advice. *Id.* at 630-32. Finding these very dangers present in the managing agency account, the Supreme Court declared it invalid.

In the present case, however, the situation is quite different than in *Camp*. The Court agrees with the Comptroller's ruling that the dangers found in *Camp*, which Glass-Steagall was designed to prevent, are simply not present in this kind of collective IRA trust asset fund. Initially, there is no danger of misuse of a bank's lending power to support speculative securities activity. Citibank cannot lend money to its CIT. 12 C.F.R. § 9.18(b)(8)(i). Further, the Comptroller's regulations and ERISA itself preclude Citibank from making a loan to an individual holder of a unit of beneficial interest in the fund. 12 C.F.R. § 9.18(b)(8)(i), I.R.C. § 408(a)(4). Finally, as the Comptroller found, it is "implausible" that Citibank would put its own assets at risk by making unsound loans to companies whose securities the CIT owns. The entire structure of the fund is towards diversification. Any such loans would only minimally affect the value of the fund itself.

Secondly, there is no danger of the bank using its reputation to hide the dangers involved with the securities market. As noted above, this is a fiduciary relationship involving tightly regulated and statutorily restricted IRA trust assets. The safeguards built into ERISA itself act so as to protect the IRA account holder in a way the ordinary securities investor could never be protected. The IRA account holder knows that his money is protected. This is precisely why he has opened such an account. The securities investor, on the other hand, ought to be aware of the risk he is taking and so ought not to be in a position to be fooled into thinking his money is just as safe as if deposited. That is one of the purposes behind Glass-Steagall, but it simply is not present here.

Third, and finally, the "promotional interests" hazard is also "non-existant or negligible." (R. 9). It is the IRA settlor who directs, in writing, which of several available IRA investment options his trust assets are to be placed into. (R. 3). The CIT is only one of many choices. The bank has no "salesman's stake" in selling units in the CIT. What it is selling is its services an an IRA trustee in general. Moreover, Citibank imposes no sales charge or commission to IRA trusts to acquire units in the CIT. (R. 12). The Court agrees with the Comptroller's finding that this creates no greater or different risks "than when a bank engages in its customary fiduciary functions." (R. 13). There exists further no greater risk to the bank's solvency, good name and good will should the CIT fail than if a traditional fiduciary trust were to likewise fare badly. (R. 12). For all these reasons, the Comptroller was correct and acted reasonably when he ruled that the Citibank CIT involved none of the Glass-Steagall hazards enumerated in *Camp*.

d) The fact that the Citibank Collective Investment Fund is advertised does not make it illegal under the Glass-Steagall Act.

Plaintiff makes much of the fact that Citibank has aggressively advertised the Collective Investment Fund to the public. Plaintiff argues that this is a prohibited act of "marketing" under Glass-Steagall, and shows further that the fund involves "securities" under that Act. The Court, however, finds this argument to be strained at best, and completely inaccurate.

Without repeating the analysis gone through above, the Court reiterates that the units of beneficial interest in the Citibank CIT are not "securities" under the Glass-Steagall Act regardless of their being "mass-marketed." Citibank is not advertising the CIT itself. Rather, Citibank is marketing its entire IRA trust service. The advertising of the CIT is used to attract customers to utilize Citibank as their IRA trustee. There is nothing improper about a bank advertising its various services to the public. *Franklin National Bank v. New York*, 347 U.S. 373 (1953). *See also, NYSE v. Smith*, 404 F.Supp. 1091, 1097 (D.D.C. 1975), *vacated on other grounds sub nom., NYSE v.*

Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

Moreover, there is nothing in ERISA, Glass-Steagall or any other statute which prohibits the marketing of a bank's IRA trust services by way of its advertising its collective investment fund for IRA accounts. The only limitation on advertising any common trust is inapplicable to the Citibank CIT since it is a fund consisting solely of tax exempt retirement assets. 12 C.F.R. § 9.18(a)(1), (2); (b)(5)(v).

Finally, to find that the advertising of such IRA trust services was in violation of Glass-Steagall would be to totally frustrate the purpose of ERISA. Congress was concerned with encouraging retirement savings. In order to fulfill its mission as a means of reaching such a goal, an IRA account service must be advertised to the general public. Only by the type of "mass-marketing" which plaintiff complains of here will the general public be aware of the opportunities available for beneficial methods of preparing for one's retirement.

CONCLUSION

For all the reasons above, the Court concludes that the Comptroller acted reasonably when he made his Ruling approving the Citibank Collective Investment Trust for IRA trust assets. There being no genuine issue of material fact in dispute, the Court, by Order of even date herewith, denies plaintiff's motion for summary judgment, and grants the defendants' motions for summary judgment to the extent hereinbefore stated.

/S/ CHARLES R. RITCHEY

CHARLES R. RICHEY
United States District Judge

Date: November 8, 1984

[Reprinted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE, *Plaintiff,*	
v.	Civil Action No. 83-0549
C.T. CONOVER, ET AL., *Defendants.*	

ORDER

In accordance with the Opinion of even date herewith, it is by the Court, this 8th day of November, 1984, hereby

ORDERED that defendants' motions for summary judgment be and hereby are granted to the extent consistant with the opinion hereinbefore stated in the Opinion of even date herewith, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and the same is hereby denied, and it is

FURTHER ORDERED that this case will stand dismissed, and the clerk shall remove it from the docket of the Court.

/S/ CHARLES R. RICHEY

CHARLES R. RICHEY
United States District Judge

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY CITIBANK, N.A., PURSUANT TO 12 C.F.R. § 9.18(c)(5) TO ESTABLISH COMMON TRUST FUNDS FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST EXEMPT FROM TAXATION UNDER SECTION 408 OF THE INTERNAL REVENUE CODE OF 1954.

DECISION

Background

Citibank, N.A., ("Bank") proposes to establish common trust funds for the collective investment of individual retirement account trusts ("IRA trusts") which are exempt from taxation under Section 408 of the Internal Revenue Code of 1954 ("I.R.C."). The Bank would act as trustee of the individual IRAs and, as trustee, would be directed to invest the IRA trust assets in a common trust fund or funds maintained by the Bank. It intends to register the funds with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940 ("Investment Company Act") and to register the offering of interests in the funds under the Securities Act of 1933 ("Securities Act"). The Bank would, as trustee, perform the functions of investment adviser, administrator, custodian and transfer agent of the fund pursuant to an agreement with them and comply with all applicable provisions of the Securities Act and the Investment Company Act. It is because some requirements of these laws might arguably conflict with certain provisions of 12 C.F.R. § 9.18(b) generally applicable to bank collective investment funds that the Bank is requesting that the Office, pursuant to 12 C.F.R. § 9.18(c)(5), waive the applicability of the provisions of 12 C.F.R. § 9.18(b) to the extent necessary to permit compliance with the Securities Act and the Investment Company Act.

Power of National Bank to Collectively Invest IRA Trust Assets

The regulations of this Office relating to the collective investment of trust funds, 12 C.F.R. § 9.18, permit IRA trust assets to be collectively invested by national banks acting as fiduciaries. The regulations generally establish two situations in which it is permissible to collectively invest funds: (i) under 12 C.F.R. § 9.18(a)(1), a bank acting as trustee or in a similar fiduciary capacity may invest the funds held in that capacity in a common trust fund; and (ii) under 12 C.F.R. § 9.18(a)(2), a bank as fiduciary may invest in a fund consisting solely of assets of retirement or similar trusts exempt from federal income taxation. Retirement fund assets are not precluded from investment in a common trust fund. 12 C.F.R. § 9.18(b)(2). As discussed below, it is readily apparent that a national bank receiving IRA trust assets does so in the capacity of trustee; it is also obvious that IRA trusts are retirement plans exempt from federal income tax. Thus, IRA trust assets may, pursuant to the Comptroller's regulations, be commingled in either a § 9.18(a)(1) or 9.18(a)(2) fund.

The power of a national bank acting as trustee for IRA trusts to commingle the trust assets was confirmed in the Employee Retirement Income Security Act of 1974 ("ERISA") and in its legislative history. It was ERISA that essentially created the concept of IRAs by providing special tax treatment for retirement trusts established by persons not covered by employer-sponsored qualified retirement plans.

The term "individual retirement account" is defined as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a "written governing instrument" meeting certain requirements. I.R.C. § 408(a). (Custodial and annuity accounts are covered by special provisions not relevant here.) One of the requirements is that the trustee be a bank or some other party able to demonstrate to the satisfaction of the Secretary of the Treasury its ability to meet similar fiduciary standards. I.R.C. § 408(a)(2). Another

requirement is that the assets not be permitted to be commingled "except in a common trust fund or common investment fund." I.R.C. § 408(a)(5). The power to further commingle the assets of IRA trusts in a fund containing assets of plans exempt from taxation under I.R.C. § 401(a) is conferred by I.R.C. § 408(e)(6). The House Report clearly indicates the Congressional understanding about the nature of IRA trusts.

> [A]n individual retirement account generally is to be a *domestic trust* created or organized by a written instrument for the exclusive benefit of an individual or his beneficiaries. . . . The balance in an individual retirement account generally may be invested in any assets that are acceptable investments for a qualified plan. . . . However, account assets generally are not to be commingled with other property except *in a common trust fund*. . . . Under the governing instrument, *the trustee of an individual retirement account generally is to be a bank*.

H. R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 4797-98 (emphasis added). While the House bill was not the version ultimately adopted, its provisions relating to individual retirement accounts were not materially altered in the final version. Thus, the Conference Report notes:

> Under the conference substitute, the assets of an individual retirement account *may be invested in a trusteed* or custodial *account with a bank*, savings and loan, or credit union, or in an annuity or in a qualified retirement bond. . . . [T]he assets of an individual retirement account may not be commingled with other property, except *in a common trust fund*. . . . [T]his legislation . . . is not to limit in any way the application of the Federal securities laws to individual retirement accounts *or the application to them of the laws relating to common trusts* or investment funds maintained by any institution.

H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5116-17 (emphasis added). The Conference Report did expand the

investment choices available to persons establishing individual retirement accounts by permitting the use of custodial accounts, annuity contracts, and qualified bonds. But what is significant here is that it continued the authorization for the use of trust accounts with bank trustees authorized to commingle the funds in common trust funds subject to all laws generally applicable to common trust funds. Accordingly, the overwhelming conclusion to be drawn from ERISA and its legislative history is that Congress believed it to be within the power of banks to serve as trustees for IRA trusts and to collectively invest the assets of these trusts in common trust funds or in collective investment funds for retirement plan assets.

Glass-Steagall Act Consideration

Having determined that collectively investing the assets of IRA trusts is a permissible trust service sanctioned by statute and the Comptroller's regulations, it is necessary to determine whether sections 16, 20, 21 or 32 of the Banking Act of 1933 (12 U.S.C. §§ 24 (Seventh), 377, 378 and 78, respectively) (commonly referred to collectively as the "Glass-Steagall Act") impose any impediment to a bank offering these fiduciary services.

We have concluded that there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets. Among other things, the decision of the Supreme Court in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) (*"ICI v. Camp"*) supports the conclusion that the prohibitions of the Glass-Steagall Act do not apply to a bank's collectively investing IRA trust assets in the manner proposed here. As discussed below, *ICI v. Camp* recognized that banks have traditionally commingled trust assets, thereby distinguishing the offering of such fiduciary services from the commingled agency account in that case. Furthermore, the fiduciary services being considered here do not present the hazards and potential abuses which Congress sought to avoid when it enacted the Glass-Steagall Act.

In *ICI v. Camp*, the Supreme Court held that the marketing and sale of securities representing interests in collectively invested

assets held by a national bank in managing agency accounts violated the Glass-Steagall Act. Certain general similarities may be seen between the fund in that case and the proposed collective investment of IRA trust assets considered here. In particular, the plan in each instance involves a fund which would be registered under the Investment Company Act and interests in such fund which would be registered as securities under the Securities Act. In addition, each plan involves the collective investment of participants' assets in a fund maintained for the benefit of the participants, as opposed to third-party beneficiaries. But the similarities end there. The differences between the two plans are highly significant in terms of analysis of the applicability of the Glass-Steagall Act. The most significant difference is that the commingling of managing agency accounts discussed in *ICI v. Camp* did not involve the receipt by the bank of assets in trust. Rather, the assets were received in a managing agent capacity. 401 U.S. at 622 n.8. The Court noted that serving as a managing agent was a legitimate fiduciary function for bank trust departments but went on to find that the collective investment of the assets of those accounts, when marketed to the general public as investment vehicles registered pursuant to the federal securities laws, violated the prohibitions in sections 16 and 21 of the Glass-Steagall Act, relating to underwriting, issuing, selling and distributing securities. In its discussion, however, the Court noted that "[f]or at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." 401 U.S. at 624. Since the IRA assets in the present case will be received by the Bank as trustee, in both a common-law sense and within the meaning of ERISA, the collective investment of IRA trust assets (and marketing of such fiduciary services to the extent allowable under applicable laws and regulations) is clearly sanctioned by the statement of the Court in *ICI v. Camp*.

The analysis under the Glass-Steagall Act requires further consideration in this case, however, in light of the fact that the IRA trusts (and participations in the fund) will be offered as

"securities" registered pursuant to the Securities Act. The Court's conclusion in *ICI v. Camp* was that the issuance and sale of securities by a bank violated the Glass-Steagall Act where the securities represented a nontraditional banking service and where, in the Court's view, certain potential abuses that Congress sought to avoid by the enactment of the Glass-Steagall Act were present. This Office has viewed the meaning of the term "securities" under the securities laws as not necessarily synonomous with its meaning under the Glass-Steagall Act. In particular, when, as in the present case, the "securities" merely represent the formal manifestation of a traditional banking service, it is the Office's opinion that the prohibitions of the Glass-Steagall Act are not applicable. Nevertheless, since the Bank's fiduciary service will be offered in this manner, it may be appropriate to assess the transaction in terms of the hazards and potential abuses identified by the Court in *ICI v. Camp*.

The Court indicated that Congress was concerned primarily with promotional pressures and certain attendant hazards and potential abuses arising from the investment banking business. In particular, these abuses involved (1) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (2) the temptation to support the securities firm with unsound loans; (3) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (4) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (5) the interference by the bank's securities business with its ability to provide disinterested investment advice. 401 U.S. at 630-33. Each of the enumerated potential abuses is nonexistent or negligible in the context of commingled IRA trusts.

For example, the Bank's reputation could conceivably be affected in some measure by the performance of its IRA trust fund, but in view of the absence of any current adverse effects on the reputation of banks arising from their significant involvement

in the collective investment of pension fund assets, it is difficult to treat this as a real concern. The concerns relating to pressures to make improvident loans are similarly misplaced. The Bank would be barred by I.R.C. § 4975 from lending to the trust. And in light of the annual contributions limitations for investment in IRA trusts, it is unlikely that the Bank would be lending to the fund participants for this purpose. Finally, in the case of a highly diversified fund, it seems implausible that the Bank would be tempted to lend to any issuer whose securities are held by the fund merely to support the fund. The insulation of the trust department from confidential information obtained in the commercial lending business further reduces the likelihood of this hazard. *Cf.* 12 C.F.R. § 9.7(d). And with regard to providing investment advice, the same rationale concerning diversification of investment makes it implausible that the Bank would be tempted to render anything but disinterested advice. In any event, the potential for conflicts of interest and other abuses cited in *ICI v. Camp* are not any more present when a bank administers collectively invested IRA trust assets than when a bank engages in its customary fiduciary functions. Accordingly, because the potential for abuse is nonexistent or negligible here, and because this is essentially a traditional banking service, it would be inappropriate to conclude that there is any security here for purposes of the Glass-Steagall Act.

Considerations Relating to the Federal Securities Laws

A review of the current treatment accorded collectively invested IRA trust assets under the federal securities laws is instructive, particularly where, as apparently is the case here, a bank in an abundance of caution elects registration under the Investment Company Act and the Securities Act rather than pursuing exemptions which are available to bank common trust funds and collective investment funds for tax-exempt pension plans, as well as the interests in such funds. Among other things, it underscores the essential similarities between collectively

invested IRA trust assets and traditional banking services exempt under those Acts.

The SEC has, in a series of interpretive letters, generally maintained that no exemption from registration under the Securities Act and the Investment Company Act is available where a bank seeks to collectively invest IRA trust assets as proposed here. *See* Continental Bank of Norristown, Pa. (pub. avail. Sep. 2, 1982); United Missouri Bank of Kansas City, N.A. (pub. avail. Dec. 31, 1981); Owensboro National Bank (pub. avail. July 29, 1981); Citytrust (pub. avail. Mar. 9, 1980); The Millikin National Bank of Decatur (pub. avail. April 1, 1979); Continental Illinois National Bank and Trust Co. of Chicago (pub. avail. April 28, 1975). *See also,* SEC Release No. 33-6188 (Feb. 1, 1980). This position has been asserted despite two exemptions under each Act that arguably should apply: the exemption for common trust funds maintained by banks and the exemption for collective investment funds of certain tax-exempt pension plans. 15 U.S.C. § 77c(a)(2); 15 U.S.C. § 80a-3(c)(3) and (11). Because of the SEC's unwavering position in this regard, the Bank has determined that it should register its fund and the participating IRA trusts under the securities laws.

With respect to the common trust fund exemption, the SEC has steadfastly maintained that it is available only for participation in funds maintained by a bank for "bona fide fiduciary purposes." The SEC contrasts with this the notion of public investment vehicles. For support, the SEC cites the legislative history of the Investment Company Act Amendments of 1970 ("1970 Amendments") in which both houses of Congress stated that the exemption applies to "traditional common trust funds maintained by banks as investment vehicles for the assets held by the bank in a bona fide fiduciary capacity. . . . [I]t would not exempt interests or participations in bank funds maintained as vehicles for direct investment by individual members of the public." *H.R. Rep. No.* 1382, 91st Cong., 2nd Sess. 43 (1970); *S. Rep. No.* 184, 91st Cong., 1st Sess. 27 (1969). The problem with the SEC's reliance here is twofold. First, as discussed above, the Bank is

accepting IRA trusts in a traditional, bona fide fiduciary capacity —*i.e.*, as trustee. Second, the fund is not a vehicle maintained for "direct investment" by the public but is, instead, an investment vehicle for the Bank as trustee of IRA trusts, precisely the thing contemplated as exempt in the reports cited above. *Cf. International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 565 (1979).

The *bona fides* of the fiduciary relationship can easily be seen from the purpose of establishing or augmenting an IRA trust. The participant is not seeking short-term investment profit but, instead, is seeking preservation and management of assets that will be available only to the participant when the participant reaches age 59½, or to the participant's beneficiaries in the event of death, unless the participant is willing to incur substantial tax penalties. Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death.

The other exemption often cited in this context covers certain tax-exempt pension interests. The SEC has repeatedly denied the availability of this exemption on the grounds that it applies to interests in funds for pension plans exempt from taxation under I.R.C. § 401, whereas IRA trusts are exempt from taxation under I.R.C. § 408, an assertion that clearly is true on the face of the statute. In this regard the SEC cites the legislative history of ERISA referred to above and certain language in a 1975 Study Outline prepared by a Senate subcommitee. The legislative history of ERISA does include the statement that the "legislation . . . is not to limit in any way the application of the Federal securities laws to individual retirement accounts," but there is no indication that the conference committee meant this to include the registration requirements of the Securities Act or the Investment Company Act. Rather, the conference committee could have intended only that the antifraud provisions of the securities laws would be applicable or, more likely, that they were not expressing any view as to the applicability of the securities laws. Yet another interpretation could be that the committee intended the securities laws to be applicable if the pension fund or common

trust fund exemption was not available—*i.e.*, if the trustee was not a bank. In any event, the rather cryptic sentence is capable of multiple interpretations that would not preclude the availability of the various exemptions. A more direct statement cited by the SEC is contained in a 1975 Study Outline on The Securities Activities of Commercial Banks prepared by the Subcommittee on Securities of the Senate Banking, Housing and Urban Affairs Committee. The Outline, at 13, notes that "because IRA's are not trusts described in Section 401 of the Code, IRA's and collective investment funds for IRA's clearly are not exempt from registration under the Investment Company Act of 1940 and the Securities Act of 1933." The statement does support the SEC's view. However, it was not made in the context of any legislative action; it was not made contemporaneously with the passage of ERISA; it was not made by the Senate Committee responsible for ERISA; it was not even made by a full Senate committee. What is more significant is that it was really only a tentative view expressed by the subcommittee, since in soliciting comments the Outline specifically had asked, among other things, "3. Are banks precluded from investing IRA assets in any collective fund unless it is registered under the Investment Company Act of 1940? Under the Securities Act of 1933?" *Id.* at 14.

Further, the subcommittee reprinted lengthy materials submitted by Messrs. Mayer, Brown & Platt as counsel to Continental Illinois National Bank and Trust Company of Chicago (Continental). The Continental materials are instructive in several respects. They contain counsel's analysis of why the § 401 plan exemption should be applicable and the SEC's rejection of that argument. With regard to the Investment Company Act, counsel noted that the 1970 Amendments, providing an exemption for § 401 plans, merely restated the SEC's interpretive position that, even in the absence of specific statutory language, tax-exempt pension trusts were not required to be registered as investment companies. The 1970 legislation codified this prior to the creation of tax-exempt IRA trusts in 1974. The fact that Congress granted the tax exemption under new I.R.C. § 408 should not

have altered the Investment Company Act exemption. A similar view of the scope of roughly comparable amendments in 1970 to the Securities Act of 1933 was enunciated by the Court in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 564-65 (1979). The § 401 plan exemption was created, in the Court's view, so that pension plans purchasing excess amounts of employer securities *"and only such plans"* were required to be registered. 439 U.S. at 565 n.19 (emphasis added).

Continental also urged the notion that the fact that I.R.C. § 408 gave the tax exemption to IRA trusts was not a conscious decision on the part of Congress vis-a-vis the securities laws. Rather, it was a drafting technique related to other technical problems in ERISA. The Senate bill on ERISA would, in fact, have deemed IRAs to be I.R.C. § 401 plans for certain cited purposes, such as the excise tax provisions of I.R.C. § 4975, but would have exempted them from certain other cited provisions applicable to qualified pension plans, such as the funding rules. The House bill ultimately used as the vehicle for ERISA adopted a different drafting technique, putting IRAs in a separate new Code section and spelling out the rules applicable to IRA trusts in that section. The SEC found these and other reasons unpersuasive and refused to grant Continental a no-action position, relying instead on the "plain language" of the exemptions.

The requirement of registration of IRA trusts or collective investment funds for them was further called into doubt by the Supreme Court's decision in the *Daniel* case referred to above. In that case the Court held that an employee's interest in a noncontributory pension plan was not even a security for the purposes of the federal securities laws. Several subsequent cases have extended this view to contributory plans. *See* Cunha v. Ward Foods, Inc., Civ. No. (D.Ha., June 21, 1982) (mandatory employee contributions); *O'Neil v. Marriott Corp.*, Civ. No. (D. Md. May 11, 1982) (voluntary employee contributions); *Tanuggi v. Grolier, Inc.*, 471 F. Supp. 1209 (S.D.N.Y. 1979) (mandatory employee contributions); *Newkirk v. General Electric Co.*, 20 F.E.P. Cases 1588 (N.D.

Cal. 1979) (noncompulsory contributions by employees). The SEC apparently has not been pursuaded by these lower court cases. *See* SEC Release No. 33-6188 (1980). The rationale in each case is that the protections of the securities laws are not needed, nor on their face mandated, for pension interests adequately safeguarded by other regulatory schemes. The same rationale would appear to apply here, although it is not a basis for our decision. For example, the Comptroller's rules in 12 C.F.R. Part 9, together with common law fiduciary principles, would appear to provide an adequate substitute for the securities laws in protecting participants' interests. Further, the rules on prohibited transactions contained in ERISA apply to IRA trusts and funds for their collective investment. Finally, while the fiduciary standards of Title I of ERISA are not applicable to collective investment funds containing IRA trusts only, they would apply to collective investment funds for IRA and other retirement plan assets, a type of commingling expressly contemplated by the legislative history of ERISA.

The Bank's Ruling Request

The Bank has requested, pursuant to 12 C.F.R. § 9.18(c)(5), a waiver of the applicability of those provisions of 12 C.F.R. § 9.18(b) that might be inconsistent with provisions of the Securities Act and the Investment Company Act. In particular, the only provision of 12 C.F.R. § 9.18 identified as creating a conflict is the requirement, in § 9.18(b)(12), that the Bank maintain exclusive management of collective investment funds it administers. It is not clear that this provision of § 9.18 will be violated, since, among other things, the Bank will serve at the outset as the investment adviser to the collective fund. Nevertheless, it could be argued that the Bank will not be in compliance with the "exclusive management" requirement because of requirements in the Investment Company Act that a majority of the board or committee of directors of the fund be independent and that the

board and the participants have the power to replace the investment adviser. Other provisions identified by Bank counsel, relating to fees, advertising, and evidence of ownership, do not create any apparent conflict.

We note that the SEC, pursuant to Section 6(c) of the Investment Company Act, 15 U.S.C. § 80a-6(c), may waive provisions of the Act, such as the independent board requirement of Section 10, 15 U.S.C. § 80a-10, provided it is consistent with the investor protection provisions of the Act. The SEC has, in the past, granted limited waivers to banks from the provisions of Section 10. The Bank has indicated that it prefers not to seek similar waivers from the SEC in this instance based on communications with SEC staff indicating that, among other things, the waiver process could be protracted and, quite probably, would involve extended public hearings, and further based on the bank's marketing surveys indicating the importance of offering its trust services to the public piror to year-end 1982.

Conclusion

The Office has carefully considered the legality of the activities proposed by the Bank. For the reasons presented above, it is my opinion that the Bank may offer this fiduciary service, even if registration is effected under the Investment Company Act and the Securities Act. Accordingly, on the basis of this legal analysis and our consideration of other relevant information presented by the bank, the application is approved this day.

/s/ C.T. CONOVER

C.T. CONOVER
Comptroller of the Currency

Dated: 10/21/82

[Reprinted]

Comptroller of the Currency
Administrator of the National Banks

Washington, D.C. 20219

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY WELLS FARGO BANK, N.A., TO ESTABLISH A COMMON TRUST FUND FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST ASSETS EXEMPT FROM TAXATION UNDER SECTION 408(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Introduction

Wells Fargo Bank, N.A. ("Wells Fargo" or the "Bank") proposes to establish a common trust fund ("Trust") for the collective investment of individual retirement account ("IRA") trust assets exempt from taxation under Section 408 of the Internal Revenue Code of 1954, as amended ("I.R.C."). Wells Fargo has requested this Office's confirmation that the Trust's activities comply with this Office's regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9, and with relevant provisions of the national banking laws, notably certain requirements of the Banking Act of 1933, as amended, 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78 ("Glass-Steagall Act") For the reasons set forth below, this Office is of the view that the activities of the Trust, as hereinafter described, constitute bona fide fiduciary activities which comply with the requirements of 12 C.F.R. Part 9 (except for certain provisions with respect to which this Office exercises its approval authority under 12 C.F.R. § 9.18 (c) (5)) and are not inconsistent with the requirements of the Glass Steagall Act.

The Trust

Wells Fargo has established the Trust under the laws of California as a trust pursuant to a Declaration of Trust ("Trust

Agreement"). Under the Trust Agreement, Wells Fargo will act as the exclusive trustee ("Trustee") of the Trust. The Trust Agreement provides that Wells Fargo, as Trustee, will act as investment adviser, administrator, custodian and transfer agent to the Trust, and will have the power and authority necessary to act on behalf and for the protection of the Trust with respect to the investment, redemption, holding and distribution of Trust assets; Wells Fargo, as Trustee, also has executed an investment advisory agreement with the Trust. The activities of the Trustee will be conducted under the direction of a supervisory committee of the Trust, the members of which will assume those powers and duties imposed on investment company directors under the Investment Company Act of 1940 ("Investment Company Act") (15 U.S.C. §§ 80a-1 *et seq.*), and a majority of whose members will not be officers, directors or employees of the Bank within the meaning of the Investment Company Act.

Under the Trust Agreement, beneficial interests in the Trust will be divided into two series of non-transferable Units. The first series of Units will represent interests in a Corporate Index Fund, the assets of which shall be invested in a portfolio of common stocks approximating the capitalization-weighted composition of the Standard and Poor's 500 Stock Price Composite Index. The second series of Units will represent interests in Small Companies Stock Fund, the assets of which will be invested in a portfolio of equity securities approximating the capitalization-weighted composition of the Wells Fargo Bank Small Companies Stock Index, an index consisting of the fifth quintile of companies (bottom 20%) whose securities are listed on the New York Stock Exchange. The assets of each of the two funds, however, will be invested in money market instruments pending the attainment by each fund of a specified minimum level of funding.

Units in the Trust will be available exclusively to IRA trusts which are established with Wells Fargo in compliance with I.R.C. § 408, including simplified employee pensions created under I.R.C. § 408(j)-(k) ("qualified IRA trusts"). If, at any time, an IRA trust participating in the Trust ceases to be a qualified

IRA trust, the Trust Agreement provides that the Trustee shall withdraw from the Trust all Units owned by that participating trust. Each qualified IRA participant will execute a written agreement with Wells Fargo authorizing Wells Fargo, as trustee of the IRA trust, to invest IRA trust assets in Trust Units in conformance with the Trust Agreement. Qualified IRA trusts may place their assets in one or both series of Trusts Units, and may thereafter transfer assets from one series of Units to the other. Wells Fargo has received an opinion of counsel stating that the Trust qualifies as a common trust fund under I.R.C. § 584, and has applied to the Internal Revenue Service ("IRS") for a ruling to that effect.

The Trust Agreement, Trust registration materials, and relevant provisions of federal and California laws and regulations, together impose several significant restrictions on the activities of the Trust and Trustee. Under sections 2228-2239 of the California Civil Code, Wells Fargo, as Trustee, generally is required to administer the Trust for the exclusive benefit of the respective participants, and may not take any actions not explicitly permitted under the Trust Agreement which are inconsistent with the interests of these participants. In addition, Wells Fargo represents it will not promote its credit facilities to customers as a means of funding qualified IRA trusts, and qualified IRA trusts otherwise pledged or used as security for any loan will lose their qualified status under I.R.C. § 408 and hence their eligibility for participation in the Trust. The Trust also is precluded from investing in any securities or deposit instruments of Wells Fargo or its affiliates, and may not make any loans to Wells Fargo or any affiliate thereof. Moreover, Wells Fargo otherwise is precluded under this Office's regulations from having any interest in the Trust other than in its fiduciary capacity. 12 C.F.R. § 9.18(b)(8).

Wells Fargo intends to offer the Trust to IRA customers as part of a total IRA program, and will advertise the Trust as being merely one of several IRA alternatives. Specifically, Wells Fargo will offer the following IRA management alternatives: (i) Wells

Fargo certificates of deposit; (ii) the Trust; and (iii) self-directed brokerage accounts, transactions for which will be introduced by Wells Fargo for execution, clearance and settlement by an unaffiliated broker-dealer. IRA Trusts will be able to select one or more of the available IRA alternatives and thereafter to transfer assets from one alternative to another. IRA Trusts which participate in more than one of Wells Fargo's IRA alternatives will receive one consolidated account statement reflecting activities in each of the IRA options selected. Although Wells Fargo has established a separate schedule of fees for each of its IRA alternatives, the Bank's internal profit projections have been developed on a consolidated basis for all IRA alternatives. Accordingly, the Trust will not be marketed as a separate investment service independent of the other IRA options being offered.

In view of positions previously articulated by the Securities and Exchange Commission ("SEC") and its staff concerning the applicability of the Investment Company Act and the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*) ("Securities Act") to collective investment funds consisting of IRA trusts, Wells Fargo has determined to register the Trust with the SEC as an investment company under the Investment Company Act, and to register the Trust Units under the Securities Act, rather than undertaking the protracted process of seeking possible exemptions from these requirements.

Discussion

Wells Fargo's proposal to establish a collective fund for the collective investment of IRA trust assets is not a question of first impression for this Office. We previously have determined that the commingling of retirement trust assets by a national bank is a traditional bank fiduciary service explicitly acknowledged by this Office's fiduciary service regulations. *Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation Under Section 408 of the Internal*

Revenue Code of 1954 (October 21, 1982) ("*Citibank Decision*"),[1] at 2-3. Moreover, as previously observed, the commingling of IRA trust assets by a bank through the vehicle of a common trust fund or common investment fund was expressly recognized and confirmed by the Congress in the Employee Retirement Income Security Act of 1974 ("ERISA"). *Citibank Decision*, at 3-6. We further determined that the commingling of individual retirement trust assets as part of a bona fide fiduciary service was consistent with the requirements of the Glass-Steagall Act, as stated by the U.S. Supreme Court in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI v. Camp*"). *Citibank Decision*, at 6-11, 18-19.

A. Compliance of Trust with Supervisory Requirements Concerning the Collective Investment of Retirement Funds By National Banks.

The regulations of this Office concerning the collective investment of funds received in a fiduciary capacity are set forth in 12 C.F.R. Part 9, particularly 12 C.F.R. § 9.18. Title 12 C.F.R. Part 9 has been promulgated by this Office pursuant to the authority of 12 U.S.C. § 92a, which confers on national banks the right, subject to the approval of this Office and when not in contravention of local law, to engage in trust activities. Under these regulations, national banks are permitted to invest collectively, either by means of a common trust fund or a collective fund composed exclusively of assets of tax-exempt retirement, pension, profit-sharing, stock bonus or other similar trusts, funds received in a fiduciary capacity, subject to a number of requirements and restrictions.

This Office has examined the Wells Fargo application and supporting materials, and has determined that the administration of the Trust satisfied the requirements of 12 U.S.C. § 92a and 12 C.F.R. § 9.18, subject to certain exceptions as to which this Office

1. This decision has been challenged. *Investment Company Institute v. Conover*, Civil Action No. 83-0549, *dismissed without prejudice* (D.D.C. Nov. 30, 1983).

exercises its administrative approval authority under 12 C.F.R. § 9.18(c)(5) in order to allow the Trust to operate.

The provisions of the Trust Agreement governing, among other things, proportional interests, valuations, distributions, segregation, expenses, and evidences of interest comply with relevant provisions of 12 C.F.R. § 9.18.[2] Because the Trust consists exclusively of retirement assets which are held by Wells Fargo, the Trust is qualified under 12 C.F.R. § 9.18(a)(2) as a collective investment trust fund not subject to the advertising restrictions of 12 C.F.R. § 9.18(b)(5). *See* Comptroller's Trust Opinion No. 9.6100. Moreover, the Trust Agreement's prohibitions on transactions between the Trust on the one hand, and Wells Fargo and its affiliates on the other hand, and restrictions on Trust borrowings and Unit pledgings, satisfy the self-dealing and conflicts provisions of 12 C.F.R. § 9.18(b)(8). *See also* 12 C.F.R. § 9.12.

One provision of 12 C.F.R. § 9.18 which raises a question regarding the Trust's compliance is the requirement of 12 C.F.R. § 9.18(b)(12), which provides that a national bank must maintain "exclusive management" of its collective investment funds. Wells Fargo, out of an abundance of caution and in order to avoid protracted hearings before the SEC on requests for exemption, has chosen to register the Trust with the SEC under the Investment Company Act,[3] which states, among other things, that no investment company may have a board of directors of which a

2. Wells Fargo's fee structure for its IRA accounts will vary according to the deposit and investment options selected by the account holder. Fees charged to qualified IRA trusts participating in the Trust will be higher than those fees charged to IRA trusts which select the Bank's certificate of deposit option, although the Trust fees will be lower than those charged to IRA trusts choosing the self-directed brokerage option. The proportionate fee requirements of 12 C.F.R. § 9.18(b)(12) are satisfied, however, inasmuch as, according to Wells Fargo, the proportionate fees charged to participating IRA trusts would be much lower than any fees which would be charged to an IRA trust participant seeking to place assets in an individually-managed portfolio of securities approximating the investment strategies incorporated into the Trust Agreement.

3. *See discussion* at pp. 19-20 *infra*.

majority are officers, directors or employees of one bank. Investment Company Act § 10(c) (15 U.S.C. § 80a-10(c)). Accordingly, the overall direction of the Trust's affairs will be under the Trust's supervisory committee, the majority of which will be unaffiliated with Wells Fargo. Consequently, it may be argued that the Trust's compliance with the unaffiliated director provisions of the Investment Company Act is inconsistent with the "exclusive management" provisions of 12 C.F.R. § 9.18(b)(12).

We previously observed in the *Citibank Decision* that it was not clear that the Citibank collective trust approved in that decision, which also provided for a supervisory committee the majority of whose members would not be affiliated with the bank, would violate the exclusive management provisions of 12 C.F.R. § 9.18(b)(12), inasmuch as, "among other things, [Citibank] will serve at the outset as the investment adviser to the collective fund." *Citibank Decision*, at 18. Nevertheless, it was determined therein that approval was appropriate pursuant to this Office's authority under 12 C.F.R. § 9.18(c)(5) to permit the Citibank collective trust to operate in compliance with 12 C.F.R. § 9.18. Upon consideration of the Wells Fargo proposal, we similarly conclude that, while the Trust's activities may not satisfy the 12 C.F.R. § 9.18(b)(12) "exclusive management" requirements, it is appropriate to allow the Trust to be administered in accordance with the Office's authority under 12 C.F.R. § 9.18(c)(5).

The exclusive management provisions of 12 C.F.R. § 9.18(b)(12) are designed generally to ensure that a national bank fiduciary has the requisite authority to administer a collective fund in satisfaction of all its fiduciary responsibilities, and to prevent delegations or reservations of authority which interfere with the bank's fulfillment of these responsibilities. While Wells Fargo is sole Trustee and investment adviser to the Trust and hence has the authority to make all investment decisions for the Trust, the Trust's supervisory committee has ultimate control over, and responsibility for, the affairs of the Trust.

Nevertheless, we believe that the nature of the Trustee's relationship with the trust in this case is such that the Trustee has been accorded substantial management of the Trust and that, pursuant to 12 C.F.R. § 9.18(c)(5), the Trust may be permitted to operate in compliance with 12 C.F.R. § 9.18. In this regard, investment decision-making authority for the Trust is vested in the Trustee and may be exercised without the prior approval of the Trust's supervisory committee. Further, the Bank, as Trustee, serves in a number of capacities, including those of investment adviser, administrator, custodian and transfer agent to the Trust. Moreover, the Bank has clear responsibilities for all of the day-to-day activities of the Trust, and generally can be held fully accountable for actions taken in contravention of its fiduciary responsibilities. *See* pp. 16-17 *infra*. These facts and circumstances, in our view, adequately ensure that the Trustee's management responsibilities currently are sufficient to allow it to exercise substantially its fiduciary responsibilities, regardless of the Trust supervisory committee's ultimate oversight responsibilities. Should these facts and circumstances change, however, *i.e.*, should the Trust supervisory committee remove Wells Fargo as Trustee or investment adviser, this Office reserves the right to withdraw the 12 C.F.R. § 9.18(c)(5) approval granted herein.

Further, a bank administering a collective investment fund must cause a periodic audit of the fund to be made by auditors responsible only to the board of directors of the sponsoring bank. 12 C.F.R. § 9.18(b)(5)(i). The Trust Agreement establishing the Trust provides that the Bank will periodically cause an audit of the Fund to be conducted by independent certified public accountants responsible only to the Trust's supervisory committee, in accordance with the Investment Company act and rules thereunder. As indicated above, only a minority of the members of the supervisory committee are affiliated with the Bank. The Bank, however, as Trustee, will make all reports required by law or by the supervisory committee. Provided that the Bank also will have access, through the affiliated members of the supervisory committee, to the results of the periodic audits of the Trust,

we believe, pursuant to 12 C.F.R. § 9.18(c)(5), that the auditing procedures of the Trust are acceptable for purposes of 12 C.F.R. § 9.18(b).

B. Compliance with Glass-Steagall Act Requirements

We are asked to consider whether the Trust's activities may be conducted in compliance with relevant provisions of the Glass-Steagall Act. Specifically, Section 16 thereof (24 U.S.C. § 24 (Seventh)), states that a national banking association may not, except as otherwise explicitly provided, buy and sell "securities and stock" for its own account, and "shall not underwrite any issue of securities or stock. . . ." By the same token, Section 21 (12 U.S.C. § 378) provides that it is unlawful "[f]or any person, firm, corporation . . . engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . stocks, bonds, debentures, notes or other securities, to engage at the same time in the business of receiving deposits . . . ." The issue presented by the Wells Fargo application, therefore, is whether the activities of the Trust are proscribed by Sections 16 and 21 of the Glass-Steagall Act.[4]

This Office previously has determined that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA trust assets." *Citibank Decision*, at 7. We stated that our conclusion is supported by the Supreme Court's decision in *ICI* v. *Camp*, which distinguished between the offering of traditional fiduciary services by a bank on the one hand, and the promotion of commingled agency accounts on the other hand, for purposes of the Glass-Steagall Act. *Citibank Decision*, at 7, 8-11. We further observed that the collective trust vehicle approved in the

4. We need not consider the applicability of Sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. § § 378 and 78), generally prohibiting affiliations and management interlocks between banks and firms engaged "principally" and "primarily" in the investment banking business, respectively, inasmuch as, among other things, it should follow that the Trust's activities would not be proscribed by Sections 20 and 32 if they pass muster under the provisions of Sections 16 and 21. *See Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 58 n.24, 64 (1981).

Citibank Decision was essentially a traditional banking service expressly confirmed by the Congress in ERISA and thus that it would be inappropriate to conclude that this sort of activity was proscribed by the Glass-Steagall Act. *Id.*

We have closely examined the Wells Fargo request, and carefully analyzed the materials submitted by the Bank in support of its request, and conclude that the proposed Wells Fargo Trust similarly represents the offering of a bona-fide fiduciary service expressly authorized by the Congress in ERISA. Accordingly, we conclude that the Trust's activities are consistent with the provisions of the Glass-Steagall Act and relevant case law. *ICI* v. *Camp, supra.*

Our conclusion regarding the *bona fides* of the fiduciary services proposed to be offered by Wells Fargo is supported first by the nature of the relationships between Wells Fargo and the Trust, and Wells Fargo and individual IRA participants, created by the Trust Agreement and relevant governing instruments. Under California law,[5] a valid express trust is created when the following elements exist: (i) a competent trustor, (ii) a trustor intent to create a trust, (iii) a trustee, (iv) an estate conveyed to the trustee, (v) acceptance of the estate by the trustee, (vi) a beneficiary, (vii) a legal purpose, and (viii) a legal term. Calif. Civil Code §§ 2216, 2218-19, 2221-22. *See, e.g., In re Johnson's Estate*, 303 P.2d 1 (Cal. 1965); *Reagh v. Kelley*, 89 Cal. Rep. 425, 10 C.A.3d 1082 (Cal. App. 1970); *Williams v. Miranda*, 323 P.2d 794 (Cal. App. 1965). Because the Wells Fargo Trust Agreement and qualified IRA trust agreements contain these elements, we are satisfied that the Trust and participating IRA trusts are valid trusts under California law. Similarly, the Trust satisfies applicable California law governing the establishment of a common trust fund. *See* Calif. Fin. Code § 1564. Accordingly, under the terms of 12 U.S.C. 92a, Wells Fargo is empowered to offer the fiduciary services represented by the Trust.[6]

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5. The terms of a trust instrument made and performed in California are governed by California law. *Desser v. Bank of America National Trust and Savings Association*, 353 F.2d 468 (9th Cir. 1965).

6. See p. 7 *supra.*

I.R.C. § 408(a) defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a written governing instrument meeting certain requirements. Inasmuch as the Trust and the qualified IRA trusts on their face appear to be bona fide trusts, and contain the terms required by I.R.C. § 408(a), they satisfy the establishment requirements of I.R.C. § 408 governing IRA trust accounts. In turn, because the qualified IRA trusts participating in the Trust have been established in compliance with I.R.C. § 408 and hence are eligible for commingling under I.R.C. § 408(a)(5), we are satisfied that the Trust represents exactly that sort of IRA commingling activity sanctioned by the Congress in ERISA. *See* H. R. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 5116-5117; *Citibank Decision*, at 2-6.[7]

Because the Trust, and participating IRA trusts, have been established as trusts under California law, and in compliance with I.R.C. § 408, the Bank is subject to significant obligations as Trustees of the Trust and the qualified IRA trusts. Among other things, Wells Fargo will be subject to strict requirements of California law obligating the Bank to administer the Trust and qualified IRA trusts for the exclusive benefit of the Trust participants, and broadly prohibiting trustee self-dealing, undisclosed adverse interests, transactions involving undue influence on the part of a trustee, and fraudulent trustee conduct. Calif. Civil Code §§ 2228-2239. *See also* Calif. Civil Code § 2261. *See generally* Restatement (Second) of Trusts §§ 169-185 (1959). In addition, the Bank, as Trustee, is subject to relevant provisions of the I.R.C. and regulations promulgated thereunder, governing, among other things, prohibited transactions by "disqualified persons" (which include fiduciaries). *See* I.R.C. § 4975. These provisions effectively limit the Bank's ability to use Trust assets

7. The Trust has sought a ruling from the Internal Revenue Service that it is eligible for treatment under I.R.C. § 584 as a common trust fund. The common trust fund qualification, however, is not required for the trust to operate in compliance with I.R.C. § 408. *See* I.R.C. § 408(a)(5).

to, among other things, purchase its own securities or deposit instruments, to lend or borrow money from the Trust, or otherwise apply trust assets to purposes other than those exclusively benefiting its participants. Similar restrictions are imposed by this Office's fiduciary regulations. *See* 12 C.F.R. §§ 9.12, 9.18(b)(8).[8] Wells Fargo has indicated its intention to comply with the above-mentioned provisions of law.

The *bona fides* of the Trust fiduciary relationships is further demonstrated by the purposes for which an individual trustor establishes an IRA trust. The participant is not seeking short-term investment profit but instead is seeking preservation and management of assets that will be available only to the participant when the participant reaches age 59½, or to the participant's beneficiaries in the event of death, unless the participant is willing to incur substantial tax penalties. *See* I.R.C. § 408(f). Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death. *See* I.R.C. § 408(a). Accordingly, there is nothing either in the terms or purposes of the Trust or qualified IRA Trusts to suggest that they should be treated as anything other than bona fide trust relationships for purposes of our analysis,[9] and we conclude that on the face of the trust relationships established, the Trust represents a bona fide fiduciary service not subject to the Glass-Steagall Act. *ICI* v. *Camp*, 401 U.S. 624-25, 638.

Continuing our inquiry further, we find that, as was the case with the Citibank collective investment fund, the hazards and potential abuses created when a commercial bank enters the investment banking business, and against which Congress sought

8. California Financial Code § 1591 also prohibits the commingling of corporate assets and trust funds or the use of trust funds in the conduct of corporate business, and makes knowing violations of this section by any bank officer a felony.

9. We have no reason to believe that the federal judiciary would not treat IRA trust accounts as true fiduciary relationships between financial institutions and individuals. *See, e.g., In re Dunn*, 5 Bankr. Rep. 156 (U.S. Bankr. Ct., N.D. Tex. 1980).

to legislate in the Glass-Steagall Act,[10] do not exist or are negligible in the instant application. *See Citibank Decision*, at 9-11. As we noted therein, the purpose and nature of the collective investment of IRA assets, together with the restrictions of the I.R.C. and 12 C.F.R. Part 9, reduce the danger of promotional abuses identified by the Court in *ICI v. Camp*. Moreover, we can identify features of the Wells Fargo application which further reduce potential Glass-Steagall Act hazards. Among other things, because of restrictions contained in California and federal law, the Trust will not be promoted as the type of collective investment vehicle prohibited by the Glass-Steagall Act. As noted above, relevant provisions of California fiduciary law broadly prohibit any Trustee activities which conflict or otherwise are inconsistent with the interests of the Trust participants. By the same token, under federal law (I.R.C. § 408(e)-(f)) and the Trust Agreement, contributions to IRAs and distributions of IRA assets are subject to significant tax-oriented limitations; although assets of an IRA may, under certain conditions, be redirected to another investment option or another IRA trustee, continuous, high-volume Unit redemptions are not expected to occur.

Accordingly, it would appear that relevant state fiduciary provisions (as well as 12 C.F.R. Part 9) will substantially control the types of hazards identified in *ICI v. Camp*. Similarly, while the Trust Units are, in one sense, freely purchased or redeemed, the tax disincentives built into premature redemptions effectively limit potential promotional pressures on the Bank. Of equal significance is the fact that the Trust will be promoted as part of a total IRA program offered by Wells Fargo, *i.e.*, merely one of

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10. In *ICI v. Camp*, the Court identified these hazards and abuses as involving: (i) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (ii) the temptation to support the securities firm with unsound loans; (iii) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (iv) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (v) the interference by the bank's securities business with the bank's ability to provide disinterested investment advice. 401 U.S. at 630-33.

several individual retirement options available to its customers, and not as a new and separate collective vehicle for the investment of non-fiduciary assets. In addition, Wells Fargo has represented that it will not promote the availability of loans from its credit department for the purpose of funding an IRA.

In sum, the legal nature of the Trust and qualified IRA trusts, coupled with the restrictions on the promotion and availability of the Trust for general investment purposes, plainly distinguishes the Trust from the type of managed agency collective account vehicle prohibited under the Glass-Steagall Act. *ICI* v. *Camp*, 401 U.S. at 638. As the Supreme Court observed, "[T]here is a plain difference between the sale of fiduciary services and the sale of investments." *Id.* *See also Citibank Decision*, at 6-11. That plain difference has been established to our satisfaction with respect to the type of service being offered by Wells Fargo through the Trust, and we conclude that the Trust may operate in compliance with Sections 16 and 21 of the Glass-Steagall Act.

Our Conclusion is not affected by the fact that Wells Fargo has chosen to register the Trust, and participations therein, with the SEC under the Investment Company Act and Securities Act, respectively. As noted above, Wells Fargo has selected this course of action in light of past SEC and SEC staff interpretations regarding the availability of certain exemptions under these statutes for, among other things, common trust funds and collective pension, profit sharing and retirement accounts (and interests in such funds and accounts).[11] Whatever the merits of the SEC's positions, which were discussed at length in the *Citibank Decision* (at pp. 11-18), the requirements of the Securities Act and the Investment Company Act have no significant relevance to the issue at hand, *i.e.*, whether the Wells Fargo Trust represents the offering of a bona fide fiduciary service under the Glass-Steagall Act. In addition, we note that the scheme of federal securities regulation, directed towards the protection of investors,

11. *See, e.g.*, Section 3(2) of the Securities Act (15 U.S.C. § 77c(2)); Sections 3(c)(3) and 3(c)(11) of the Investment Company Act (15 U.S.C. §§ 80a-3(c)(3) and 80a-3(c)(11)).

differs significantly in purpose and function from the Glass-Steagall Act, a statutory scheme designed to protect the interest of bank depositors and the safety and soundness of the banking system, and the administration of which in this case is the statutory responsibility of this Office. In light of the foregoing, it is sufficient to note that the SEC's positions with respect to relevant provisions of the federal securities laws are not inconsistent with our conclusion that the Wells Fargo Trust is a bona fide fiduciary service which complies with applicable provisions of the Glass-Steagall Act. *See A.G. Becker Incorporated v. Board of Governors of the Federal Reserve System*, 693 F.2d 136 (D.C. Cir. 1982), *petition for cert. granted sub nom. Securities Industry Association v. Board of Governors of the Federal Reserve System*, _U.S. , 104 S. Ct. 65 (1983).

Conclusion

Upon extensive and considered analysis of the request and supporting materials submitted by the Bank, we have concluded that the activities of the Trust, as described above and in the materials submitted, represent a bona fide fiduciary service which complies, with the permission granted herein pursuant to 12 C.F.R. § 9.18(c)(5), with the requirements of 12 U.S.C. § 92a and 12 C.F.R. Part 9 promulgated thereunder, and also complies with relevant provisions of the Glass-Steagall Act. Accordingly, for the reasons stated above, it is our opinion that the Bank may lawfully offer this fiduciary service.

/S/ H. JOE SELBY

H. Joe Selby
Senior Deputy Comptroller for
Bank Supervision

Dated: January 27, 1984

[Reprinted]

Comptroller of the Currency
Administrator of the National Banks

Washington, D.C. 20219

January 31, 1984

Mr. John H. McGuckin, Jr.
Vice President and Associate Counsel
Bank of California, N.A.
P.O. Box 45000
San Francisco, California 94145

Dear Mr. McGuckin:

This is in response to your various letters of last Fall regarding the bank's planned offering of collective investment to IRA customers. The bank's program, involving four separate Investment Portfolios, is quite similar to the previously-approved IRA program of other banks. *See Decision of the Comptroller of the Currency on the Application by Citibank, N.A. , Pursuant to 12 C.F.R. § 9.18(c) (5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954* (October 31, 1982); *Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A. to Establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954, as Amended* (January 27, 1984). The Office is of the view that the activities described in your letters and attachments thereto constitute bona fide fiduciary activities which comply with the requirements of 12 C.F.R. Part 9 and are not inconsistent with the requirements of the Glass-Steagall Act, specifically 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78.

This Office has carefully considered the features of the bank's collective trust and the participating IRA trusts. In two respects,

the bank's collective trust appears to deviate from the requirements of 12 C.F.R. § 9.18(b). The pertinent provisions require the bank to exercise exclusive management over its collective investment funds and require the outside auditors to be responsible solely to the bank's board of directors. See 12 C.F.R. §§ 9.18(b)(5)(i), 9.18(b)(12). Both provisions conflict with aspects of the IRA program which arise out of the bank's decision to register the collective trust with the Securities and Exchange Commission as an "investment company" under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*

For the reasons set forth in the above-cited Decisions, which are equally applicable to the bank's IRA program, this Office grants permission pursuant to 12 C.F.R. § 9.18(c)(5) for the bank to operate the proposed collective trust. As with the previous applications by other banks, the Office reserves the right to rescind this approval should the supervisory committee of the bank's collective trust interfere with or terminate the management duties of the bank as trustee and investment adviser to the collective trust.

Very truly yours,

/S/ H. JOE SELBY

H. JOE SELBY
SENIOR DEPUTY COMPTROLLER FOR
BANK SUPERVISION

[Reprinted]

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY CONNECTICUT BANK AND TRUST COMPANY, N.A., TO ESTABLISH A COMMON TRUST FUND FOR THE COLLECTIVE INVESTMENT OF INDIVIDUAL RETIREMENT ACCOUNT TRUST ASSETS EXEMPT FROM TAXATION UNDER SECTION 408(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED.

Introduction

Connecticut Bank and Trust Company, N.A. ("CBT" or the "Bank") proposes to establish a collective investment trust ("Trust") for the collective investment of individual retirement account ("IRA") trust assets exempt from taxation under Section 408 of the Internal Revenue Code of 1954, as amended ("I.R.C."). CBT seeks this Office's confirmation that the Trust's activities comply with this Office's regulations governing the fiduciary powers of national banks, 12 C.F.R. Part 9, and with relevant provisions of the national banking laws, notably certain requirements of the Banking Act of 1933, as amended, 12 U.S.C. §§ 24 (Seventh), 377, 378 and 78 ("Glass-Steagall Act"). For the reasons set forth below, this Office has determined that the activities of the Trust, as hereinafter described, constitute bona fide fiduciary activities authorized to national banks under applicable laws which comply with the requirements of 12 C.F.R. Part 9 (except for certain provisions with respect to which this Office exercises its approval authority under 12 C.F.R. § 9.18(c)(5)) and are not inconsistent with the requirements of the Glass-Steagall Act.

The Trust

CBT has established the Trust under the laws of Connecticut as a trust pursuant to a Declaration of Trust ("Trust Agreement"). Under Trust Agreement, CBT will act as the exclusive trustee ("Trustee") of the Trust. The Trust Agreement provides

that CBT, as Trustee, will act as investment adviser, administrator, custodian and transfer agent to the Trust, and will have the power and authority necessary to act on behalf and for the protection of the Trust with respect to the investment, redemption, holding and distribution of trust assets; CBT, as Trustee, also has executed an investment advisory agreement with the Trust. The activities of the Trustee will be conducted under the direction of a supervisory committee of the Trust, the members of which will assume those powers and duties imposed on investment company directors under the Investment Company Act of 1940 ("Investment Company Act") (15 U.S.C. §§ 80a-1 *et seq.*), and a majority of whose members will not be officers, directors or employees of the Bank within the meaning of the Investment Company Act.

Under the Trust Agreement, beneficial interests in the Trust will be divided into three classes of non-transferable Units. The first series of Units will represent interests in a U.S. Government Securities Portfolio, the assets of which will be invested in a portfolio of fixed-income securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities with maturities of up to seven years. It seeks to increase participating assets by providing current income and stability of principal. The second class of Units will represent interests in an Equity Growth Portfolio, the assets of which will be invested in a portfolio of equity securities or securities convertible into equity securities of mature, well-established, large and medium-sized companies whose securities are actively traded. It seeks to increase participating Trust assets by providing long-term capital appreciation, with current income a secondary objective. The third class of Units will represent interests in a Special Equity Portfolio, the assets of which will be invested in a portfolio of equity securities or securities convertible into equity securities of smaller and medium-sized growth-oriented companies which may not have an established long-term operating record. This Portfolio, which seeks to increase participating Trust assets by providing long-term capital appreciation, is intended for participants who can accept a somewhat higher level of risk.

Units in the Trust will be available exclusively to IRA trusts which are established with CBT in compliance with I.R.C. § 408, including simplified employee pensions created under I.R.C. § 408(j)-(k) ("qualified IRA trusts"). If, at any time, an IRA trust participating in the Trust ceases to be a qualified IRA trust, the Trust Agreement provides that the Trustee shall withdraw from the Trust all Units owned by that participating trust. Each qualified IRA participant will execute a written agreement with CBT authorizing CBT, as trustee of the IRA trust, to invest IRA trust assets in Trust Units in conformance with the Trust Agreement. Qualified IRA trusts may place their assets in one or more series of Trust Units, and may thereafter transfer assets from one series of Units to another. CBT has received an opinion of counsel stating that the Trust qualifies as a common investment fund under I.R.C. § 408, and has applied to the Internal Revenue Service ("IRS") for a ruling to that effect.

The Trust Agreement, Trust registration materials, and relevant provisions of federal and Connecticut laws and regulations, together impose several significant restrictions on the activities of the Trust and Trustee. Under Connecticut law, CBT, as Trustee, generally is required to administer the Trust for the exclusive benefit of the respective participants, and may not take any actions not explicitly permitted under the Trust Agreement which are inconsistent with the interests of these participants. For example, Connecticut law imposes upon the Trustee significant fiduciary duties and obligations, including the duty to obey the donor's instructions, [1] to protect the fund,[2] to exercise due diligence,[3] to be completely loyal to the interests of the beneficiaries,[4] and to avoid being influenced by any third-party or personal interest which may conflict with duties as Trustee.[5] In addition,

1. *Conway v. Emeny*, 96 A.2d 221, 139 Conn. 612 (1953).

2. *Palmer v. Hartford National Bank & Trust Company*, 279 A.2d 726, 160 Conn. 415 (1971).

3. *McClure v. Middleton Trust Company*, 110 A. 838, 95 Conn. 148 (1920).

4. *Phillips v. Moeller*, 170 A.2d 897, 148 Conn. 361 (1961); *Conway v. Emeny, supra*, 96 A.2d 221, n. 11.

5. *Lyman v. Stevens*, 197 A. 313, 123 Conn. 591 (1938).

CBT represents that it will not promote its credit facilities to customers as a means of funding qualified IRA trusts, and qualified IRA trusts otherwise pledged or used as security for any loan will lose their qualified status under I.R.C. § 408 and hence their eligibility for participation in the Trust. The Trust also is precluded from investing in any securities or deposit instruments of CBT or its affiliates, and may not make any loans to CBT or any affiliate thereof. Moreover, CBT otherwise is precluded under this Office's regulations from having any interest in the Trust other than in its fiduciary capacity. 12 C.F.R. § 9.18(b)(8).

CBT intends to offer the Trust to IRA customers as part of a total IRA program, and will advertise the Trust as being merely one of several IRA alternatives. Specifically, CBT will offer the following IRA management alternatives: (i) CBT savings accounts; (ii) the Trust; and (iii) stocks, bonds or U.S. Treasury securities. IRA trusts will be able to select one or more of the available IRA alternatives and thereafter to transfer assets from one alternative to another. IRA trusts which participate in more than one of the CBT IRA alternatives will receive one consolidated account statement reflecting activities in each of the IRA options selected. Although CBT has established a separate schedule of fees for each of its IRA alternatives, the Bank's internal profit projections have been developed on a consolidated basis for all IRA alternatives. Accordingly, the Trust will not be marketed as a separate investment service independent of the other IRA options being offered.

In view of Securities and Exchange Commission ("SEC") and SEC staff interpretive positions concerning the applicability of the Investment Company Act and the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*) ("Securities Act") to collective investment funds consisting of IRA trusts, CBT has determined to register the Trust with the SEC as an investment company under the Investment Company Act, and to register the Trust Units under the Securities Act, rather than undertaking the protracted process of seeking possible exemptions from these requirements.

Discussion

CBT's proposal to establish a collective fund for the collective investment of IRA trust assets is not a question of first impression for this Office. We previously have determined that the commingling of retirement trust assets by a national bank is a traditional bank fiduciary service explicitly acknowledged by this Office's fiduciary service regulations, and that the commingling of IRA trust assets was authorized by the Congress when it enacted relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). *Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts Exempt from Taxation Under Section 408 of the Internal Revenue Code of 1954* (Oct. 21, 1982) ("*Citibank Decision*") at 2-3. This decision was challenged, and this Office's position was affirmed in *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984) ("*D.C. Opinion*"). In January 1984, this Office approved similar applications made by Wells Fargo Bank, N.A., and the Bank of California, N.A., to establish collective funds for the investment of IRA trust assets. *Decision of the Office of the Comptroller of the Currency on the Application by Wells Fargo Bank, N.A., to establish a Common Trust Fund for the Collective Investment of Individual Retirement Account Trust Assets Exempt from Taxation under Section 408(a) of the Internal Revenue Code of 1954, as amended* (January 27, 1984) ("*Wells Fargo Decision*") at 1; Letter from H. Joe Selby, Senior Deputy Comptroller, to John H. McGuckin, Esquire, Bank of California, January 31, 1984. These decisions were also challenged. A decision setting aside this Office's two rulings was issued on August 28, 1984, *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and has been stayed pending appeal ("*California Opinion*").

We remain of the view previously expressed, notwithstanding the controversy that followed these earlier decisions and despite the fact that *Wells Fargo Decision* has been set aside by the

district court and is now pending appeal. As the District Court pointed out in upholding the *Citibank Decision*, the commingling of IRA trust assets by a bank through the vehicle of a common trust fund or common investment fund was expressly recognized and confirmed by the Congress in ERISA. *D.C. Opinion*, 596 F. Supp. at 1500, 1501. That same decision also affirmed that the commingling of individual retirement trust assets as part of a bona fide fiduciary service was consistent with the requirements of the GlassSteagall Act, as stated by the U.S. Supreme Court in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI* v. *Camp*"). *D.C. Opinion*, 596 F. Supp. at 1501-1503.

A. Compliance of Trust with Supervisory Requirements Concerning the Collective Investment of Retirement Trusts By National Banks

The regulations of this Office concerning the collective investment of funds received in a fiduciary capacity are set forth in 12 C.F.R. Part 9, particularly 12 C.F.R. § 9.18. Title 12 C.F.R. Part 9 has been promulgated by this Office pursuant to the authority of 12 U.S.C. § 92a, which confers on national banks the right, subject to the approval of this Office and when not in contravention of local law, to engage in trust activities. Under these regulations, national banks are permitted to invest collectively, either by means of a common trust fund or a collective fund composed exclusively of assets of tax-exempt retirement, pension, profit-sharing, stock bonus or other similar trusts, funds received in a fiduciary capacity, subject to a number of requirements and restrictions.

This Office has examined the CBT application and supporting materials, and has determined that the administration of the Trust satisfies the requirements of 12 U.S.C. § 92a and 12 C.F.R. § 9.18, subject to certain exceptions as to which this Office exercises its administrative approval authority under 12 C.F.R. § 9.18(c)(5) in order to allow the Trust to operate. The provisions of the Trust Agreement governing, among other things, proportional interests, valuations, distributions, segregation,

expenses, and evidences of interest comply with relevant provisions of 12 C.F.R. § 9.18.[6] Because the Trust consists exclusively of retirement assets which are held by CBT, the Trust is qualified under 12 C.F.R. § 9.18(a)(2) as a collective investment trust fund not subject to the advertising restrictions of 12 C.F.R. § 9.18(b)(5). *See* Comptroller's Trust Opinion No. 9.6100. Moreover, the Trust Agreements, prohibitions on transactions between the Trust on the one hand, and CBT and its affiliates on the other hand, and restrictions on Trust borrowings and Unit pledgings, satisfy the self-dealing and conflicts provisions of 12 C.F.R. § 9.18(b)(8). *See also* 12 C.F.R. § 9.12.

One provision of 12 C.F.R. § 9.18 which raises a question regarding the Trust's compliance is the requirement of 12 C.F.R. § 9.18(b)(12), which provides that a national bank must maintain "exclusive management" of its collective investment funds. CBT, out of an abundance of caution and in order to avoid protracted hearings before the SEC on requests for exemption, has chosen to register the Trust with the SEC under the Investment Company Act,[7] which states, among other things, that no investment company may have a board of directors of which a majority are officers, directors or employees of one bank. Investment Company Act § 10(c) (15 U.S.C. § 80a-10(c)). Accordingly, the overall direction of the Trust's affairs will be under the Trust's supervisory committee, the majority of which will be unaffiliated with CBT. Consequently, it may be argued that the Trust's compliance with the unaffiliated director provisions of the

6. CBT's fee structure for its IRA accounts will vary according to the deposit and investment options selected by the account holder. Fees charged to qualified IRA trusts participating in the Trust will be higher than those fees charged to IRA trusts which select the Bank's certificate of deposit option. The proportionate fee requirements of 12 C.F.R. § 9.18(b)(12) are satisfied, however, inasmuch as, according to CBT, the proportionate fees charged to participating IRA trusts would be much lower than any fees which would be charged to an IRA trust participant seeking to place assets in an individuallymanaged portfolio of securities approximating the investment strategies incorporated into the Trust Agreement.

7. *See* discussion at pp. 25-28 *infra*.

Investment Company Act is inconsistent with the "exclusive management" provisions of 12 C.F.R. § 9.18(b)(12).

We previously observed in the *Citibank Decision* that it was not clear that the Citibank collective trust approved in that decision, which also provided for a supervisory committee the majority of whose members would not be affiliated with the bank, would violate the exclusive management provisions of 12 C.F.R. § 9.18(b)(12), inasmuch as, "among other things, [Citibank] will serve at the outset as the investment adviser to the collective fund." *Citibank Decision*, at 18. Nevertheless, we determined therein that approval was appropriate pursuant to this Office's authority under 12 C.F.R. § 9.18(c)(5) to permit the Citibank collective trust to operate in compliance with 12 C.F.R. § 9.18. Upon consideration of the CBT proposal, we similarly conclude that, while the Trust's activities may satisfy the 12 C.F.R. § 9.18(b)(12) "exclusive management" requirements, it is appropriate to allow the Trust to be administered in accordance with the Office's authority under 12 C.F.R. § 9.18(c)(5).

The exclusive management provisions of 12 C.F.R. § 9.18(b)(12) are designed generally to ensure that a national bank fiduciary has the requisite authority to administer a collective fund in satisfaction of all its fiduciary responsibilities, and to prevent delegations or reservations of authority which interfere with the bank's fulfillment of these responsibilities. While CBT is sole Trustee and investment adviser to the Trust and hence has the authority to make all investment decisions for the Trust, the Trust's supervisory committee has ultimate control over, and responsibility for, the affairs of the Trust.

Nevertheless, we believe the nature of the Trustee's relationship with the Trust in this case is such that the Trustee has been accorded substantial management of the Trust and that, pursuant to 12 C.F.R. § 9.18(c)(5), the Trust may be permitted to operate in compliance with 12 C.F.R. § 9.18. In this regard, investment decision-making authority for the Trust is vested in the Trustee and may be exercised without the prior approval of the Trust's supervisory committee. Further, the Bank, as Trustee, serves in

a number of capacities, including those of investment adviser, administrator, custodian and transfer agent to the Trust. Moreover, the Bank has clear responsibilities for all of the day-to-day activities of the Trust, and generally can be held fully accountable for actions taken in contravention of its fiduciary responsibilities. *See* p.18 *infra*. These facts and circumstances, in our view, adequately ensure that the Trustee's management responsibilities currently are sufficient to allow it to exercise substantially its fiduciary responsibilities, regardless of the Trust supervisory committee's ultimate oversight responsibilities.[8] Should these facts and circumstances change, however, *i.e.*, should the Trust supervisory committee remove CBT as Trustee or investment adviser, this Office reserves the right to withdraw the 12 C.F.R. § 9.18(c)(5) approval granted herein.

Further, a bank administering a collective investment fund must cause a periodic audit of the fund to be made by auditors responsible only to the board of directors of the sponsoring bank. 12 C.F.R. § 9.18(b)(5)(i). The Trust Agreement establishing the Trust provides that the Bank will periodically cause an audit of the Trust to be conducted by independent certified public accountants responsible only to the Trust's supervisory committee, in accordance with the Investment Company Act and rules

8. The *California Opinion* rejected the Comptroller's conclusion on this point, saying that banks cannot retain exclusive fiduciary responsibility for their common trusts when they delegate "ultimate control" to outsiders. But the court failed to recognize that under the existing facts, CBT does retain "ultimate control" for purposes of Part 9, despite the composition of the Board. 593 F. Supp. at 854. The crux of the matter is that CBT, as investment adviser to the Trust, has clear responsibility for the Trust's day-to-day operation and full investment decisionmaking authority. The Comptroller's view as to what constitutes "exclusive management" for purposes of Part 9, a regulation which he has promulgated and has particular expertise to administer, should have been accorded greater deference by the District Court. In addition, the Court failed to recognize that the "nonaffiliation" of the supervisory committee is solely the product of securities law requirements. While the *California Opinion* recognized that neither the definitions of the securities laws nor the question of registration *vel non* thereunder is dispositive of the scope of the Glass-Steagall Act (593 F. Supp. at 852-854), the Opinion in effect contradicts this view by in part basing its determination that the bank's common trusts are illegal on a factor that flows solely from securities registration.

thereunder. As indicated above, only a minority of the members of the supervisory committee are affiliated with the Bank. The Bank, however, as Trustee, will make all reports required by law or by the supervisory committee. Provided that the Bank also will have access, through the affiliated members of the supervisory committee, to the results of the periodic audits of the Trust, we believe, pursuant to 12 C.F.R. § 9.18(c)(5), that the auditing procedures of the Trust are acceptable for purposes of 12 C.F.R. § 9.18(b).

B. Compliance with Glass-Steagall Act Requirements

As we have done previously, we consider whether the Trust's activities may be conducted in compliance with relevant provisions of the Glass-Steagall Act. Specifically, Section 16 thereof (12 U.S.C. § 24 (Seventh)), states that a national banking association may not, except as otherwise explicitly provided, buy and sell "securities and stock" for its own account, and "shall not underwrite any issue of securities or stock . . . ." By the same token, Section 21 (12 U.S.C. § 378) provides that it is unlawful "[f]or any person, firm, corporation . . . engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . stocks, bonds, debentures, notes or other securities, to engage at the same time in the business of receiving deposits . . . ." The issue presented by this application, therefore, is whether the activities of the Trust are prohibited by Sections 16 and 21 of the Glass-Steagall Act.[9]

This Office previously has determined that "there is no Glass-Steagall Act impediment to a bank collectively investing IRA

9. We need not consider the applicability of Sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. §§ 377 and 78), generally prohibiting affiliations and management interlocks between banks and firms engaged "principally" and "primarily" in the investment banking business, respectively, inasmuch as, among other things, it should follow that the Trust's activities would not be prohibited by Sections 20 and 32 if they pass muster under the provisions of Sections 16 and 21. *See Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 58 n.24, 64 (1981).

trust assets." *Citibank Decision*, at 7. We stated that our conclusion is supported by the Supreme Court's decision in *ICI v. Camp*, which distinguished between the offering of traditional fiduciary services by a bank on the one hand, and the promotion of commingled agency accounts on the other hand, for purposes of the Glass-Steagall Act. *Citibank Decision*, at 7, 8-11. We further observed that the collective trust vehicle approved in the *Citibank Decision* was essentially a traditional banking service expressly confirmed by the Congress in ERISA and thus that it would be inappropriate to conclude that this sort of activity was prohibited by the Glass-Steagall Act. *Id.* Our analysis in the *Citibank Decision* was upheld in the *D.C. Opinion*, which stated that ERISA

> allow[s] the commingling of the IRA Trust assets in either a common trust or a common investment fund and that [s]such funds have long been considered traditional banking services for retirement assets, and there is a clear indication that Congress fully intended IRA assets to be invested in this manner.

D.C. Opinion, 596 F. Supp. at 1501.

In the *Wells Fargo Decision*, we considered an application substantially similar to that of Citibank, and concluded that the Wells Fargo Trust also represented the offering of a traditional fiduciary service expressly authorized by Congress in ERISA.

While the rationale on which we based this decision was not accepted in the *California Opinion*, we believe that it is supported by a strong statutory framework. It is clear, as the *D.C. Opinion* held, that the two California funds which were set aside in the *California Opinion* "were considered by Congress to be a natural extension of traditional banking activities" and therefore do not violate Glass-Steagall. *D.C. Opinion*, 596 F. Supp. at 1501. Accordingly, since the proposed activities of CBT are in all material respects identical to these others which we have previously considered and approved, we here conclude that the Trust's activities are consistent with the provisions of Glass-Steagall and relevant case law. *ICI* v. *Camp, supra.*

Our conclusion regarding the permissibility of the fiduciary services proposed to be offered by CBT is supported by the nature of the relationships between CBT as trustee of the Trust, and CBT as trustee of the individual IRA participants. Under Connecticut law, a valid express trust is created when the following elements exist: (i) a trustor intent to create a trust, (ii) a trustee, (iii) a trust property, which is held by the trustee for the beneficiary, and (iv) a beneficiary. *South End Bank and Trust Company v. Hurwitz*, 21 A.2d 407, 128 Conn. 204 (1941); *Marzahl v. Colonial Bank and Trust Company*, 364 A.2d 173, 170 Conn. 62 (1976). CBT also has provided its opinion of counsel that the CBT Trust Agreement and qualified IRA trust agreements contain these elements. Because the Trust Agreement and the qualified IRA trust agreements contain the elements required under Connecticut law, we are satisfied as to the validity of the Trust and participating IRA trusts. Similarly, the Trust satisfies applicable Connecticut law governing the establishment of a common trust fund. *See* Connecticut General Statute § 3683. Accordingly, under the terms of 12 U.S.C. § 92a, CBT is empowered to offer the fiduciary services represented by the Trust.[10]

Further, the CBT Trust, consisting of qualified IRA trust assets, is an activity authorized under ERISA. I.R.C. § 408(a) defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" pursuant to a written governing instrument meeting certain requirements. Inasmuch as the Trust and the qualified IRA trusts on their face appear to be bona fide trusts, and contain the terms required by I.R.C. § 408(a), they satisfy the establishment requirements of I.R.C. § 408 governing IRA trust accounts. In turn, because the qualified IRA trusts participating in the Trust have been established in compliance with I.R.C. § 408 and hence are eligible for commingling under I.R.C. § 408(a)(5), we are satisfied that the Trust represents exactly that sort of IRA commingling activity sanctioned by the Congress in ERISA. *See* H.R. Rep. No. 1280, 93d

10. *See* pp.8-9 *supra*.

Cong., 2d Sess., (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5116-5117; *Citibank Decision*, at 2-6.[11] This determination was affirmed in the *D.C. Opinion*, 596 F. Supp. at 1501-02.

Because the Trust, and participating IRA trusts, have been established as trusts under Connecticut law, and in compliance with I.R.C. § 408, the Bank is subject to significant obligations as Trustee of the Trust and the qualified IRA trusts. Among other things, CBT will be subject to strict requirements of Connecticut law obligating the Bank to administer the Trust and qualified IRA trusts for the exclusive benefit of the Trust participants, and broadly prohibiting trustee self-dealing, third-party interest, undisclosed adverse interests, transactions involving undue influence on the part of a trustee, and fraudulent trustee conduct. *See generally* Restatement (Second) of Trusts §§ 169-185 (1959). In addition, the Bank, as Trustee, is subject to relevant provisions of the I.R.C. and regulations promulgated thereunder, governing, among other things, prohibit transactions by "disqualified persons" (which include fiduciaries). *See* I.R.C. § 4975. These provisions effectively limit the Bank's ability to use Trust assets to purchase its own securities or deposit instruments, to lend or borrow money from the Trust, or otherwise apply trust assets to purposes other than those exclusively benefiting its participants. Similar restrictions are imposed by this Office's fiduciary regulations. *See* 12 C.F.R. §§ 9.12, 9.18(b)(8). CBT has indicated its intention to comply with the above-mentioned provisions of the law.

The fiduciary nature of the Trust is further demonstrated by the purposes for which an individual trustor establishes an IRA trust, and by the restrictions imposed by ERISA which assure that CBT "cannot serve simply as a vehicle for investment" (*D.C. Opinion*, 596 F. Supp. at 1502). The participant is not seeking a short-term profit, but is primarily interested in preservation, management and growth of assets that will be available to him only upon reaching age 59½, or to his beneficiaries in the event of

11. The Trust has sought a ruling from the Internal Revenue Service that it is eligible for treatment under I.R.C. § 408 as a common investment fund.

death, unless the participant is willing to incur substantial tax penalties. *See* I.R.C. § 408(f). Further, the participant's interest in the IRA trust or the investment fund is not transferable except by death. See I.R.C. § 408(a). Accordingly, there is nothing either in the terms or purposes of the Trust or qualified IRA trusts to suggest that they should be treated as anything other than bona fide trust relationships for purposes of our analysis,[12] and we conclude that on the face of the trust relationships established, the Trust represents a bona fide fiduciary service not prohibited by the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. at 624-25, 638. Our views regarding the fiduciary nature of these activities are not adversely affected by the fact that CBT may promote its Trust and other IRA options. *See* discussion at pp. 28-30 *infra*.

Further, we have determined that the hazards and potential abuses created when a commercial bank enters the investment banking business, and against which Congress sought to legislate in the Glass-Steagall Act,[13] do not exist or are negligible in the instant application. *See Citibank Decision*, at 9-11. As we noted therein, the purpose and nature of, among other things, the collective investment of IRA assets, together with the restrictions of the I.R.C., reduce the danger of promotional abuses identified by the Court in *ICI v. Camp*. Moreover, we can identify other features of the CBT application which further reduce potential Glass-Steagall Act hazards. For example, applicable provisions

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12. The *California Opinion*, in setting aside the Comptroller's decision in Wells Fargo, disputed this analysis and suggested that the funds were primarily of an investment rather than a fiduciary nature. *See* pp. 21-22 *infra*.

13. In *ICI v. Camp*, the Court identified these hazards and abuses as involving: (i) identification in the public's mind of the bank's reputation with that of a securities firm, with possible erosion of public confidence in the bank if the securities firm fared badly; (ii) the temptation to support the securities firm with unsound loans; (iii) the temptation to make improvident loans to securities issuers in whose securities the bank or its securities affiliate had invested; (iv) the temptation to make loans to customers to purchase securities of issuers whose securities the bank or its affiliate was underwriting; and (v) the interference by the bank's securities business with the bank's ability to provide disinterested investment advice. 401 U.S. at 630-33.

of state and federal law broadly prohibit transactions between the Trust and the Trustee, or indeed any Trustee activities which are not for the benefit of Trust participants. *See* discussion at pp. 4, 16-17 above. Moreover, under federal law (I.R.C. § 408(e)-(f)) and the Trust Agreement, contributions to IRAs and distributions of IRA assets are subject to significant tax-oriented limitations; although assets of an IRA may, under certain conditions, be redirected to another investment option or another IRA trustee, continuous, high-volume Unit redemptions are not expected to occur.

We are aware that the District Court ruling which set aside the *Wells Fargo Decision* did so in part because of doubt regarding the absence of Glass-Steagall hazards present in this type of activity. For example, the court opined that the objectivity of banks' loan decisions and of their investment advice would be as likely to be affected by their promotional interests in this type of fund as by the managing accounts held illegal in *ICI* v. *Camp*, that the possibility of "roll over" or redemption might exert pressure on banks to sell additional units, and that banks might be tempted to advise customers to purchase shares in such funds for reasons other than the comparative merit of available investments. *California Opinion*, 593 F. Supp. at 854-856. The court also feared that the manner in which the funds were offered and marketed prompted Glass-Steagall concerns, because the promotion of such collective investment funds in competition with mutual funds could tend to create a greater "salesman's stake" than do traditional common trust funds. *Id.*, at 856.

Notwithstanding the court's views, however, we continue to believe that collective funds for IRAs of the sort offered by CBT do not raise significant hazards of the sort legislated against in the Glass-Steagall Act and that our conclusion is supported by the fact that Congress intended for this and other types of collective trust vehicles to be publicly promoted. The *California Opinion*, in focusing on the manner in which the trusts are marketed,

rather than on whether they constitute a genuine fiduciary service, disregards the fact that collective investment trusts are regulated under different rules than common trust funds, and that the former may be promoted and marketed freely. In the case of collective investment funds for IRA trusts, however, Congress has spelled out the fiduciary purpose for which the individual IRA trust is established and has assured that that purpose is a genuine one by imposing statutory restrictions on the use or withdrawal of the trust assets for any other reason. Moreover, the strict limits on the amounts that may be contributed to tax-exempt IRA trusts make collective investment trusts of IRA assets inappropriate and impractical for general investment objectives.

In addition, the legislative history of certain 1970 amendments to the federal securities laws made clear the congressional intent that statutory tax-exempt collective investment trusts be promoted and marketed freely. In this regard, the Senate Report, in commenting on the fact that collective investment trusts for "Keogh plan" assets were being exempted from certain provisions of the securities laws but not from others, stated that the reason for not exempting them from the registration provisions of the Securities Act was because interests in such collective trusts would be sold to unsophisticated investors, i.e., publicly marketed.[14] Similarly, the applicability of the federal securities laws to the Trust demonstrates that Congress contemplated that retirement vehicles of this nature would be marketed to the public and thus, wished to impose the disclosure requirements of those laws.

As to the concerns regarding the hazards and abuses at which the Glass-Steagall Act is directed, the *D.C. Opinion*, in affirming the *Citibank Decision*, pointed out that the *California Opinion* was in error in failing to recognize that both Glass-Steagall and

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14. "The amendment does not exempt interests or participation by either *bank collective trust funds* or insurance company separate accounts in connection with 'H.R. 10 Plans,' because of their fairly complex nature as an equity investment and *because of the likelihood that they could be sold to self-employed persons, unsophisticated in the securities field.*" S. Rep. No. 184, 91st Cong. 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4897, 4922 (emphasis added).

ERISA permit collective investment by banks of trust assets held either in "common trust funds" or "common investment funds." *D.C. Opinion*, 596 F. Supp. at 1501. It further held that "the dangers found in *Camp*, which Glass-Steagall was designed to prevent, "*are simply not present in this kind of collective IRA trust asset fund*" (emphasis added). *Id.*, at 1503. Rebutting the fears expressed by *California Opinion*, the *D.C. Opinion*, recognized that the "promotional interests" hazard is non-existent or negligible and the bank has no "salesman's stake" in selling units in such a fund. *Id.*, at 1503. Unlike other types of investments, the Trust is a fidiciary relationship involving tightly regulated and statutorily restricted IRA trust assets. The Trust will be promoted as part of total IRA program offered by CBT, i.e., merely one of several individual retirement options available to its customers, and not as a new and separate collective vehicle for the investment of non-fiduciary assets. The bank's only "stake" here is in selling its service of managing trust assets, a stake it has in every trust situation, whether administered in a common fund or otherwise.

Accordingly, we believe that state and federal legal requirements, as well as the ERISA statutory framework governing IRA trust activities, will substantially control the types of hazards identified in *ICI* v. *Camp*. Similarly, while the Trust Units are, in one sense, freely purchased or redeemed, the tax disincentives built into premature redemptions effectively limit potential promotional pressures on the Bank. In addition, CBT has represented that it will not promote the availability of loans from its credit department for the purpose of funding an IRA.

In sum, the legal nature of the Trust and qualified IRA trust, coupled with the restrictions on the promotion and availability of the trust for general investment purposes, plainly distinguishes the Trust from the type of managed agency collective account vehicle prohibited under the Glass-Steagall Act. *ICI* v. *Camp*, 401 U.S. at 638. As the Supreme Court observed, "[T]here is a plain difference between the sale of fiduciary services and the sale of investments." *Id. See also Citibank Decision*, at 611; D.C.

Opinion, 596 F. Supp. at 1503. The type of service being offered by CBT through the Trust is precisely that contemplated in *ICI v. Camp*, and we conclude that the Trust may operate in compliance with Sections 16 and 21 of the Glass-Steagall Act. While we reach this conclusion fully aware that a similar one was recently challenged, after careful review we continue to be persuaded that our views are correct.

Our conclusion is not affected by the fact that CBT has chosen to register the Trust, and participations therein, with the SEC under the Investment Company Act and Securities Act, respectively. As noted above, CBT has selected this course of action in light of past SEC and SEC staff interpretations regarding the availability of certain exemptions under these statutes for, among other things, common trust funds and collective pension, profit sharing and retirement accounts (and interests in such funds and accounts).[15] Whatever the merits of the SEC's position, which were discussed at length in the *Citibank Decision* (at pp. 11-18), the fact that registration of the Trust may be required under relevant provisions of the federal securities laws does not affect the legality of the Trust's activities under the Glass-Steagall Act. In *Securities Industry Association v. Board of Governors of the Federal Reserve System* ("Becker"), 104 S. Ct. 2979 (1984), which held that the commercial paper marketed by a commercial bank to its customers constituted a "security" within the meaning of sections 16 and 21 of the Glass-Steagall Act, the Supreme Court relied in part on comparable terms used in provisions of the federal securities laws in reaching its conclusions. In so doing, the Supreme Court stated that the federal securities laws, being (along with the Glass-Steagall Act) part of a series of statutory provisions collectively designed to protect the integrity of the nation's financial markets, provided "considerable evidence" as to the meaning of terms used in the Glass-Steagall Act. 104 S. Ct. at 2987. Both the *D.C.* and *California Opinions*, however, have declined to construe this directive to mean that the applicability

15. *See. e.g.*, Section 3(a)(2) of the Securities Act (15 U.S.C. § 77c(a)(2)); Sections 3(c)(3) and 3(c)(11) of the Investment Company Act (15 U.S.C. §§ 80a3(c)(3) and 80a3(c)(11)).

of the federal securities laws to a particular bank activity necessarily must mean that that activity is illegal under the Glass-Steagall Act. *D.C. Opinion*, 596 F. Supp. at 1501; *California Opinion*, 593 F. Supp. at 853.

Further, as has been recognized both by the courts and by the Congress, banks have long been in the business of collectively investing assets held in trust, as well as statutory tax-exempt employee benefit and retirement assets. *See, e.g., ICI v. Camp*, 401 U.S. at 658; *California Opinion*, 593 F. Supp. at 853; *D.C. Opinion*, 596 F.Supp. at 1501; H.R. Rep. No. 1280, 93d Cong., 2d Sess. 316-317 (19740), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5117-8. Under the current scheme of federal securities regulations, however, many of these activities are subject to provisions of the federal securities laws because they involve the purchase or sale or a "security," but are statutorily exempted from the substantive regulatory provision of the securities laws. *See, e.g.*, Securities Act Section 3(a)(2), 15 U.S.C. § 77c(a)(2) (exemptions for interests in a bank-administered common trust fund or interests in certain kinds of statutory tax-exempt employee benefit funds). Inasmuch as banks have been offering these types of collective investment services without significant questions being raised as to their legality under the Glass-Steagall Act, the potential applicability of the federal securities laws to bank common trust and employee benefit activities generally, and to the CBT Trust specifically, does not, in our view, bear on their legality under the Glass-Steagall Act. The mere fact that interests in the Trust qualify as "securities" within the meaning of the securities laws does not mean that they are "securities" forbidden to banks by the Glass-Steagall Act. Such a conclusion would, as the *California Opinion* recognized, invalidate all bank collective investment vehicles. 593 F. Supp. at 853. As the *Becker* decision itself establishes, the prohibitions of the Glass-Steagall Act should not be read to deprive banks of powers which are authorized to them under the national banking laws, 104 S. Ct. 2991, n. 11, and we see no reason in the case of the Trust to permit its legality pursuant to the express authorizations of the

national banking laws and ERISA to be affected by the possible application of federal securities regulatory requirements.

C. Legality of Advertising

We have also separately considered the extent to which the legality of this type of collective investment fund is affected by the manner in which it is marketed. In the *California Opinion*, the court accepted the assertion by plaintiff ICI that the bank had violated the Glass-Steagall Act by advertising its fund to the public. 593 F. Supp. at 855-856. Upon further consideration of the issue, we continue to believe that the promotion of the Trust does not detract for its legality under the Glass-Steagall Act.

CBT proposes to market the Trust by means of an advertisement which promises to "keep track of all of the paperwork," to "take care of everything," and to provide the "best IRA with the investment option that suits your needs." It further says "invest your money any way you like" and list the three available IRA options (see p. 5 above) of which the Collective Investment Trust is last. There is no attempt to highlight the latter or to give it any special emphasis. CBT is not advertising the Trust itself. On the contrary, it is advertising and marketing its entire IRA trust service The advertising of the Trust is used to attract customers to utilize CBT as their IRA trustee. As the *D.C. Opinion* pointed out in upholding the *Citibank Decision*, there is nothing improper about a bank advertising its services to the public. 596 F. Supp. at 1503-1504.[16] Nor is there anything in ERISA, Glass-Steagall, or any other statute which prohibits the marketing of a bank's IRA trust services by the means of publicizing its IRA collective investment funds. The only limitation on advertising any common trust is inapplicable in this case since the Trust consists solely of tax-exempt retirement assets. 12 C.F.R. §§ 9.18(a)(1),(2), (b)(5)(v).

16. *Franklin National Bank v. New York*, 347 U.S. 373 (1954). *See also NYSE v. Smith*, 404 F. Supp. 1091, 1097 (D.D.C. 1975), *vacated on other grounds sub nom. NYSE* v. *Bloom*, 562 F. 2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

Moreover, to hold that advertising or promoting IRA trust services violates Glass-Steagall would totally frustrate the purposes of ERISA. *D.C. Opinion*, 596 F. Supp. at 1504. In enacting ERISA, Congress intended to encourage retirement savings by all classes of the working public at all levels of income. Since the majority of working people cannot be assumed to know all available options permitted by law for management of their retirement assets, it seems evident that only by some sort of public advertising can the general public be made aware of the opportunities available for preparing for retirement. ERISA permits collective investment as the only feasible form for management of small IRA accounts. Without publicity, individual settlors may not be aware of this option. *See also* discussion at pp. 22-24 above.

In effect, what CBT is advertising and selling is a fiduciary service of managing trust assets. Investing these assets collectively is simply the method by which such service must be offered if it is to be economically practicable. Advertising this service is a permissible activity which is neither prohibited by any existing statute nor contrary to any legislative purpose.

Conclusion

Upon extensive analysis of the request and supporting materials submitted by the Bank, we have concluded that the activities of the Trust, as described above and in the materials submitted, represent a bona fide fiduciary service which complies, with the permission granted herein pursuant to 12 C.F.R. § 9.18(c)(5), with the requirements of 12 U.S.C. § 92a and 12 C.F.R. Part 9 promulgated thereunder, and also complies with relevant provisions of the Glass-Steagall Act. Accordingly, for the reasons stated above, it is our opinion that the Bank may lawfully offer this fiduciary service.

/s/ C. T. CONOVER

C. T. Conover
Comptroller of the Currency

Dated 2/7, 1985

[Reprinted]

THE NEW YORK TIMES
MARCH 25, 1984

Only Citibank can prescribe this IRA.

The right IRA for you may be Citibank's Portfolio IRA. Citibank's the only bank in New York that offers you this choice. It's an IRA option that allows you the potential to earn higher returns by investing in Citibank managed securities portfolios. You can invest in a bond portfolio, a stock portfolio or other securities portfolios. And you have the flexibility to move from one portfolio to another anytime you want...absolutely free! If you want to be in the securities market, Citibank's Portfolio IRA could be just what the doctor ordered

The Portfolio IRA. Just one of the reasons the Citi never sleeps. Just one more way Citibank is making banking better for you. Because when you bank at Citibank, it's your Citi.

For more information about Citibank's Portfolio IRA, and a prospectus relating to the investment portfolios, including charges and expenses, call the Citibank Tax Shelter Center at 1-800-CITI IRA or 212-750-7733. Or clip the coupon below. Read the prospectus carefully before you invest or send money for the portfolios. The investment portfolios are not obligations of Citibank, are not insured, and are not available in every state.

The Portfolio IRA is a fiduciary service of Citibank offered under the Collective Investments Trust for Citibank IRAs.

Please send me the Citibank Portfolio IRA plan kit including a current prospectus. Clip and send to:
Citibank Tax Shelter Center, FDR Station,
P.O. Box 5098, New York, N.Y. 10150

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ADDRESS_____ APT_____

CITY_____ STATE_____ ZIP_____

(PHONE)_____

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CITIBANK
A CITICORP COMPANY

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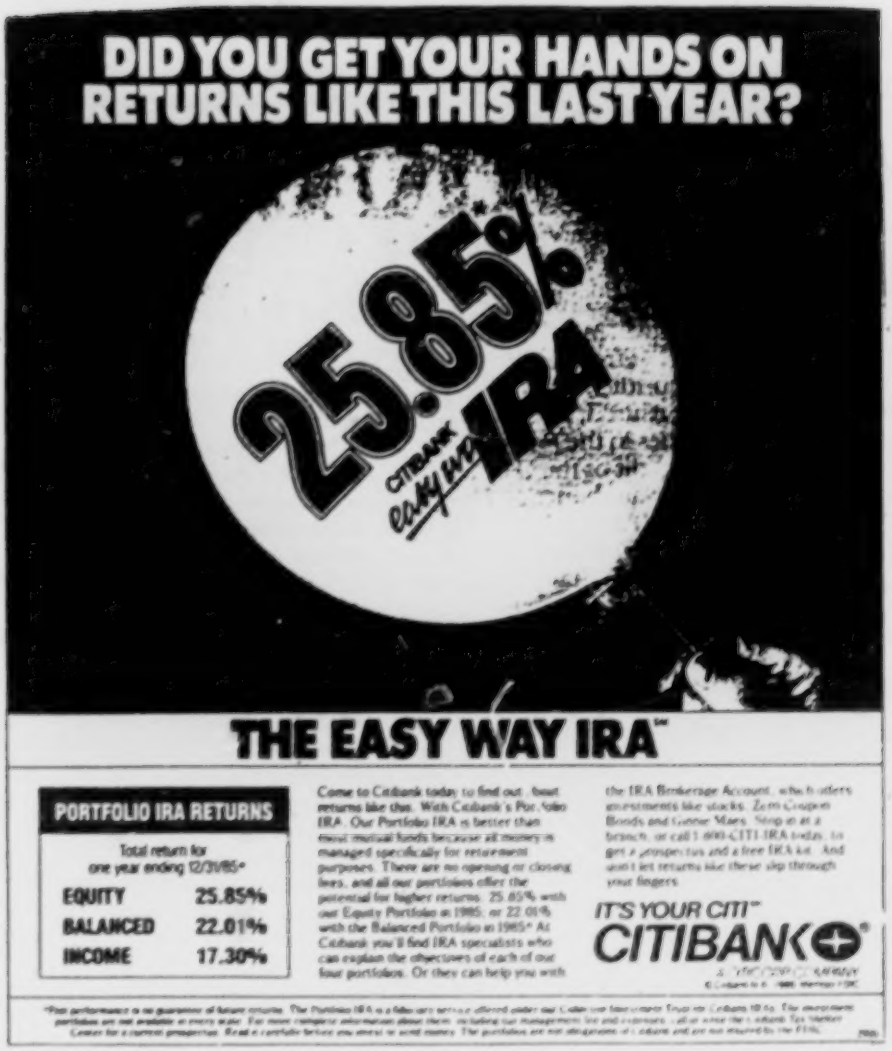
New York Times March 16, 1986



THE NEW YORK TIMES SUNDAY, MARCH 23, 1986

YOU WON'T FIND ANYPLACE IN TOWN THAT CAN OFFER YOU IRAS THE WAY WE CAN. CITIBANK.

Want the potential for higher returns?

Last year The Citibank Equity Portfolio IRA returned 25.85%!* The Portfolio IRA gives you all the advantages of a mutual fund and more. And while the risk is greater than guaranteed return investments like CDs, it's managed by some of our most astute minds in finance—professionals who manage investment portfolios of over $31 billion.

Want to choose your own stocks and bonds?

If you're one of those people who's really on top of the market, you can self direct your IRA in stocks and bonds, Ginnie Maes and Zero Coupon Bonds of your own choosing. You can really grow with our IRA Brokerage Account.

Want an investment with flexibility?

Our Insured Market Rate Account is a great place for IRAs. You have the advantage of our current money market rate, plus the ability to move your money into other accounts.

Want guaranteed returns?

Citibank has just about the widest variety of CDs you'll find, ranging from 3 month through 7 year terms. The longer the term, the more money you make. And the return is guaranteed. And FDIC insured.

Want to manage your IRAs at the touch of a button?

With Citibank Direct Access, you can stay up to the minute on all your IRA and brokerage investments at the touch of a button on your personal computer. You can even add to or change investments at any time you choose.

Want help from an IRA specialist?

Stop in at any Citibank branch. You'll find the kind of financial expertise that will make understanding all the IRA options easy. So you can make the best decision possible about which IRA is best for you.

THE EASY WAY IRA

More people in town have put more IRA money in Citibank than any other bank. Why? We make it so easy to open or manage any Citibank IRA option, there's no reason to open an IRA anywhere else. Come to Citibank today, or call our toll-free IRA hotline for more information. Because you won't find anyplace in town that can offer you IRAs the way Citibank can.

CALL 1-800-CITI-IRA

IT'S YOUR CITI™

CITIBANK

NEWS RELEASE

Comptroller of the Currency
Administrator of the National Banks

NR 83-25

Washington, D.C. 20219

For: Release After 9:00 A.M., April 3

Date: April 2, 1984

Remarks by

C. T. Conover
Comptroller of the Currency

Reserve City Bankers Convention
Boca Raton, Florida

April 3, 1984

BOOM OR DOOM: WHAT'S IN THE CARDS FOR COMMERCIAL BANKS?

It's a pleasure to be here today. I would like to talk about something that is extremely important to all of us—what's in the cards for commercial banks.

Today we stand at a crossroads; the path we choose will determine the future of commercial banking. Down one road is the bright promise of competition restored. Down the other is the threat of reregulation and a much smaller market share. Which path will it be, boom or doom? Much of it depends on how banks change their ways in the future.

As some of you are aware, there is one whole side of Congress that wants to turn back the clock and reregulate the financial services marketplace. It would be a big mistake to take their intentions lightly.

In spite of the benefits from removing interest rate ceilings, neither Congress nor consumers have been convinced of the need

for further deregulation. Banks have done a poor job of educating the public about the changes that are occurring. And they have taken too many things for granted.

Customers don't understand that banks have to charge higher fees to cover the increased costs that resulted from interest rate deregulation. Banks don't explain it to them, but somehow expect them to understand anyway. Too many banks change their fee structure and let customers find out about the change the hard way—when they use the service. Other banks don't tell customers how long it will take for a check to clear. And then they wonder why consumers have soured on deregulation.

But the future of commercial banking doesn't have to be bleak. Remember I told you there were two paths. I'd like to take out my crystal ball and describe what the future of commercial banking could be and what it could mean to your customers. Then, I will lay out a plan to help us get to that bright future we all want.

BANKING IN THE YEAR 2000

As I gaze into the crystal ball, I can see that we are in the year 2000. Banks have been given extensive product powers and can branch without restrictions. Other firms have opened consumer banks. Regulation is now based on function rather than charter. So banks, savings and loans, brokerage firms, and insurance companies look very much alike. They offer the same products and services, are regulated by the same regulators, and are competing for the same customers.

The computer has totally changed the role and practice of banking as we know it. Bankers no longer wait for a customer to walk through the door. In fact, extensive networks of brick and mortar branches are obsolete. Instead, banks take advantage of the most modern technology in voice, data, and visual communications. A well-developed network of home terminals is in place that permits consumers to access information at any time of the day or night. Of course, it is possible to transfer funds, purchase stocks or other investments, buy insurance, list real estate, and

secure the most favorable mortgage terms, all without venturing from your living room.

The bank has become the ultimate financial intermediary. Their biggest product is information. They are tied directly into a variety of computerized information networks and can access the latest research data instantaneously.

In fact, through their computer terminals customers have access to virtually all investment tools. Programs are available that rank and rate potential investments based on risk and return and a variety of other variables. The bank can provide business or individual customers with tailor-made lists of possible investment alternatives that meet the specific requirement of their individual investment strategies. These investment instruments include stocks, bonds, mutual funds, time deposits, money market funds, pool of mortgages, business and consumer loans, gold and precious metals, commodities or anything else considered valuable in the year 2000.

I can also see that from this close communication an increased level of customer loyalty has developed. Where customers once went to a dozen different institutions to obtain financial services, they now depend upon a single institution. The bank is the customer's link to tax planning advice, and real estate and insurance activities. Naturally banks even handle equipment leasing, travel and entertainment services, and a variety of other specialized services.

CONSUMERS, BUSINESSES, AND BANKS ARE BETTER OFF

I wouldn't be much of a soothsayer if I couldn't tell you who the winners will be in this new world of financial services. I can see that while banks will benefit, consumers and small businesses are the real winners from this new competition. They are receiving better products and services at better prices and are able to use a more convenient delivery system. Let me describe a few specific ways that they have gained in this new marketplace.

Banks offer cash management services that compete directly with those provided by securities firms. The forces of competition have lowered the minimum deposit requirements and made these accounts available to more consumers and businesses.

Banks originate, package, and sell loans and equity participations to investors. This provides a lot more long term capital for businesses and a lot more jobs. Banks even package small business loans as mutual funds which they privately insure.

With insurance powers, banks also have developed credit insurance for commercial loans. This insurance is an essential part of a flowering secondary market. Banks also provide other flexible insurance products at cheaper rates, and they charge lower real estate fees and cheaper rates for leasing equipment.

To sum it all up, the future for financial services looks like a winning proposition for banks, consumers, and businesses. It is providing more flexible services that better meet everyone's needs.

WHERE WE ARE TODAY

In a real sense, the marketplace is developing along the lines I have just described. Technology is taking on increasing importance each day. One of your strengths is that you realize this better than many of your competitors. But to participate in the fast-paced future I have just described requires action. You will have to find a way to move successfully from the restrictive world of Glass-Steagall, Douglas and McFadden to one where banks are allowed to participate and compete.

OCC HELPS THE TRANSITION

The Comptroller's office has been acting as an agent of change to help ensure that banks can make the transition to this new world of financial services. But we can't do it alone.

Since I became Comptroller, we have been able at least to loosen the choke hold of unnecessarily tight restrictions on commercial banks. We have authorized commercial banks to offer discount brokerage and investment advisory services. We have permitted banks to provide common trust funds for the collective

investment of IRA contributions. We have allowed them to operate futures commission merchant subsidiaries, to lease space to insurance agents, and to provide credit life insurance, and to offer plain English trusts which can broaden the market for trust services.

In addition, we have given banks greater flexibility in structuring loans to meet the needs of the marketplace. We raised the legal lending limit. We have significantly liberalized our real estate regulations. We issued a flexible regulation on adjustable-rate mortgages. We removed portfolio limits and restrictions on loan-to-value ratios and terms to maturity for real estate loans. And we permitted banks to enforce due-on-sale clauses.

Barriers to entry into the financial services system have also been reduced. The procedures for obtaining a national bank charter have been streamlined. The process for forming and acquiring operating subsidiaries has been simplified. And we eliminated or reduced the length, complexity and processing time for many of our applications.

WHAT STILL NEEDS TO BE DONE

But today the job is still only half done. The full benefits of deregulation will only be available to bank customers when banks get added flexibility through new product powers, a removal of geographic barriers, and regulation based on function. Legislation is now being considered that would address each of these areas.

The new Garn Bill would provide you with the new product powers you need to compete with Sears, Merrill Lynch and American Express. At the same time it would complete the process of interest rate deregulation by allowing you to pay interest on demand deposits.

The new Garn Bill would also be a politically realistic first step to interstate banking. It would put the federal blessing on the regional approach to interstate banking.

The recommendations of the Bush Task Force would bring us closer to functional regulation. The Federal Reserve would keep

regulatory authority over the 50 biggest bank holding companies, but other national bank holding companies would be regulated by the same regulator as all national banks. The FDIC would concentrate on deposit insurance; the SEC would regulate bank securities activities; and the Justice Department would handle bank mergers.

All the ingredients are there for a boom in commercial banking. Now you need a plan to make legislative proposals become laws.

A PLAN FOR THE FUTURE

To get what you want, further deregulation, there are three things you're going to have to do.

First, banks have to communicate better. They must keep the public informed about fees, funds availability, and other customer obligations.

Second, the banking industry has to explain the benefits of further deregulation to its customers. Tell them how they will benefit from one-step financial shopping. Let them know that when you have insurance and real estate powers, they will pay lower costs. Explain that by gathering and pooling mortgages and selling mortgage-backed securities, mortgage interest rates will become more competitive. Tell them that you will be able to provide better services for small business. Let them know about all the benefits they stand to gain.

Then, when you have convinced your customers that further deregulation is a good idea, the next step is selling it to Congress. You'll discover that is much easier to do, after you have sold the need for deregulation to their constituents, your customers.

Reregulation may be a dirty word to everyone in this room, but it is also one that none of us can afford to ignore. It's a big dark cloud looming over what could be a bright future. Don't let it rain on your parade.

That's my prescription for success. It's going to take decisive action on your part. Today nobody wants to give the banks anything. If you want further deregulation, you're going to have

to fight for it, and it will be an uphill battle. But it's better than the alternative. So which will it be—boom or doom? It's up to you.

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NEWS RELEASE

Comptroller of the Currency
Administrator of the National Banks

No. 82-44

Washington, D.C. 20219

Immediate Release

Contact: Leonora S. Cross
(202) 287-4279

October 28, 1982

Dean DeBuck
(202) 447-1800

The Office of the Comptroller of the Currency (OCC) today announced that it has approved an application by Citibank to operate trust funds for the collective investment of assets from individual retirement accounts (IRAs). The OCC said the offering of this fiduciary service will benefit the public by providing new investment opportunities for IRA holders.

The OCC said that national banks have authority to collectively invest IRA trust assets under its trust regulations and provisions of ERISA. It also stated that the Glass-Steagall Act was not an impediment to the offering of this fiduciary service.

Under the plan, Citibank would act as trustee of the individual IRAs. It would be directed to invest the IRA assets in one or more trust funds maintained by the bank. It intends to register the funds with the Securities and Exchange Commission under the Investment Company Act and to register the offering of interests in the funds under the Securities Act. As trustee, the bank would also act as investment adviser and perform other services for the funds.

Because some requirements of the Investment Company Act and the Securities Act might conflict with certain provisions of the OCC's trust regulations, the bank asked the OCC to waive those provisions to permit compliance with the securities laws. The OCC said that although it was not clear that there would be

any conflict with these regulations, it would waive those provisions, and the application was approved.

[Reprinted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

C. T. CONOVER, COMPTROLLER OF THE CURRENCY, *et al.*,
Defendants.

Civil Action No. C-84-0742
Hearing: August 24, 1984 11:00 a.m.

DEFENDANTS' MOTION TO FILE OVERSIZE BRIEF

Defendants, by their undersigned attorneys, move this Court to enter the attached Order permitting them to file a reply brief in further support of their Motion to Dismiss or, in the Alternative, for Summary Judgment, and in opposition to plaintiff's Cross-Motion for Summary Judgment, which exceeds the normal length established by Rule 220.4 of this Court. This action raises the issue whether national banks may in the exercise of their fiduciary powers establish and maintain collective investment trust funds for the purpose of collectively investing assets received by such banks as trustees of Individual Retirement Account ("IRA") trusts. The issue involves complex legal questions about banking institutions and the banking statutes. Plaintiff and defendants agree that this is an issue of great significance not only to the two banks involved here but also to the entire banking industry and the nation's financial community. A full briefing should aid the Court in resolving this important issue. The granting of this Motion is therefore warranted and in the interests of justice.

Wherefore, defendants respectfully request that this Court grant this Motion and enter the attached Order.

Respectfully submitted,
RICHARD K. WILLARD
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney
/S/ SANDRA M. SCHRAIBMAN

SANDRA M. SCHRAIBMAN
/S/ THOMAS H. PEEBLES

THOMAS H. PEEBLES

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[Reprinted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

INVESTMENT COMPANY INSTITUTE,

Plaintiff,

v.

C. T. CONOVER, *ET AL.*,

Defendants.

Civ. No. H-85-160 (JAC)

FEDERAL DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO QUESTIONS POSED BY THE COURT

Question 1: Does the failure of Congress to enact a law that would authorize an activity preclude an administrative agency from giving approval to that activity in absence of legislation?

The answer is that an administrative agency may allow an activity encompassed by proposed but unenacted legislation, so long as the activity does not contravene existing legislation. In that regard, later proposed but unenacted legislation is a poor guide to the intent of a former Congress (and thus of existing legislation). *See, Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497, 503 (D.C. Cir. 1968).

Even more significantly, the proposed but unenacted legislation on which plaintiff relies is irrelevant to the case at bar. That proposed legislation would have given banks authority to engage generally in the mutual fund business, *i.e.* to offer a pooled fund to the public as an investment vehicle alone, free from the limitations, restrictions, mandated purpose and protections that inhere in tax-exempt employment trusts eligible for participation in a collective investment trust. That Congress has not enacted such general mutual fund legislation has no effect whatsoever, legal or logical, on the permissibility of a collective investment trust.

Question 2: Does CBT's voluntary registration of the Collective Fund with the Securities and Exchange Commission provide evidence of registrability and/or is it akin to an estoppel preventing CBT from arguing that the Collective Fund is not subject to the requirements of the Securities Act?

In response to this question, we would first emphasize that the Comptroller in no way argues that the Collective Fund, and interests therein, are not subject to registration under the securities laws.[1] Thus, he is perfectly willing to accept the conclusion that they are subject to registration, whether because the law so provides or because CBT's actions have made them so.[2]

The point relevant to this action is that the status of interests in the Collective Fund as "securities" under the *Securities Act*—whether exempt or non-exempt, registered or unregistered—does not render them the "securities" forbidden to banks by the Glass-Steagall Act. Several factors demonstrate the inescapability of this conclusion:

1. Most obviously, interests in collective investment trusts for Keogh plan assets are not only "securities" within the meaning of the Securities Act, but also are (unless exempt under some other provision) *registered* under that Act, pursuant to deliberate Congressional mandate. *(See, Federal Defendants' Memorandum*

1. The SEC has advised the Comptroller that it is its position that the Collective Fund is subject to registration under the Investment Company Act and that interests in the Collective Fund are subject to registration under the Securities Act. It takes no position as to whether these registrations, or any other factor, cause the Collective Fund to run afoul of the Glass-Steagall Act, because this is solely a matter of banking law interpretation. If the Court is inclined to make a determination on whether the Collective Fund and interests therein are required to be registered under the federal securities laws, an issue which the SEC does not believe is properly before the Court, the SEC respectfully requests permission to be heard on this issue.

2. It is true that, in his Citibank ruling, the Comptroller did question the applicability of the registration provisions to IRA collective investment trusts. This discussion was in no way material to the decision. In all the Comptroller's IRA rulings and in all filings made in court to defend those rulings, the Comptroller has taken the position that, whether or not IRA collective investment trusts are subject to registration under the securities laws, they do not violate the Glass-Steagall Act.

in Support of Motion for Summary Judgment at 22-23, 30-32). This does not render them "securities" for Glass-Steagall Act purposes or in any way cause such collective investment trusts to run afoul of that Act. Thus, registration is not and cannot be a factor causing a collective investment trust to be illegal.

2. ERISA's own legislative history shows that Congress contemplated that IRA collective investment trusts would or could

[Reprinted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2623

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

v.

C. T. CONOVER, AS COMPTROLLER OF THE CURRENCY, ET AL.,
Defendants-Appellants,

and

WELLS FARGO BANK, ET AL.,
Defendants-Intervenors-Appellants.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE

JOHN J. GILL
General Counsel
MICHAEL F. CROTTY
Associate General Counsel-Litigation
Attorneys for
AMERICAN BANKERS
ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-4240

April 1, 1985

Since Individual Retirement Accounts ("IRAs") were created by the Employee Retirement Income Security Act of 1974, and most especially since IRA's were made more widely available after 1981, commercial banks represented by the American

Bankers Association have been among the principal trustees holding such accounts for the American public. In order to achieve maximum efficiency in the administration of IRA trusts, and thus provide the greatest rate of return to IRA owners and their beneficiaries, it is desirable to commingle the assets of many individual accounts in a common trust or common investment fund. Such a procedure is specifically authorized by section 408(a)(5) of the Internal Revenue Code. The Comptroller of the Currency has approved the applications of several national banks to do precisely what the law authorizes—commingle the assets of various Individual Retirement Accounts in a common fund for investment. This case is one of three currently pending legal challenges to the Comptroller's actions. The commingled IRA account program of Citibank, N.A., was challenged unsuccessfully in the United States District Court for the District of Columbia, *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984), but the case is now on appeal. In the court below, the similar programs of Wells Fargo Bank and Bank of California was successfully challenged, *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and litigation over the commingled IRA account program of Connecticut Bank & Trust Co. remains pending in the United States District Court for the District of Connecticut. *Investment Company Institute v. Conover*, Civil Action No. H-85-160 JAC (D. Conn. filed Feb. 26, 1985).

Obviously, therefore, this is an issue of nationwide importance to the banking industry. If the decision of the district court is upheld in this case, it would deprive commercial banks in this Circuit of the opportunity to offer a valuable service to their customers, deprive those customers of the benefits to be realized from that service and cast substantial doubt upon the ability of commercial banks outside this Circuit to offer the service.

[Reprinted]

Cases Nos. 84-2622, 84-2623

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

v.

C. T. CONOVER, Comptroller of the Currency; OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendant-Appellants,

and

WELLS FARGO BANK, N.A.;
and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors-Appellants

OPENING BRIEF OF DEFENDANTS APPELLANTS AND DEFENDANTS INTERVENORS—APPELLANTS

Appeal from the United States District Court for the Northern District of California Honorable William W Schwarzer, Judge District Court No. C-84-0742-WWS

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Attorneys for Wells Fargo Bank, N.A. and The Bank of California, N.A.

[material omitted]

on the advertising of common trust funds. Like Regulation F after the 1955 amendment, it does not impose these restrictions on collective investment trusts.[9]

3. ERISA and Individual Retirement Accounts

As noted, collective investment trusts consist solely of assets of tax-exempt employment-related trusts. Prior to 1974, only two general types of such trusts were authorized by the tax laws: those exclusively for the benefit of employees, and those established by and for self-employed individuals, called "Keogh" or "H.R. 10" plans. In 1974, Congress created another employment related trust, the IRA trust.[10] This was accomplished by ERISA, which added Section 408 to the Internal Revenue Code ("IRC"). ERISA was designed to encourage all working people to establish IRA's and to offer these individuals the same type of benefits and opportunities available to employee and Keogh plans.

9. Regulation 9, as originally promulgated in 1963, omitted the requirement that commingled trusts be established for "bona fide fiduciary purposes"; and did, however, impose restrictions on the advertising of common trust funds and collective investment trusts alike. In 1972 the Comptroller amended the Regulation to rescind advertising and publicity restrictions with regard to collective investment trusts. Such restrictions still apply to common trust funds. 37 *Federal Register* 24161 (1972).

10. ERISA defines an IRA as a "trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries," pursuant to a "written governing instrument" meeting certain requirements. IRC § 408(a). An IRA can also be established as a custodial account, but only if the account fulfills all the other requirements for an duties imposed on an IRA trustee. Such an account is "treated as a trust" and the custodian "treated as the trustee thereof." IRC § 408(h). Even so, such accounts may not be commingled by a bank because the assets are not received in trust. Since the IRA's in issue are all trusts, the custodial account provisions are irrelevant.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Plaintiff-Appellee,

vs.

C. T. CONOVER, Comptroller of the Currency; OFFICE OF THE COMPTROLLER OF THE CURRENCY, An Agency of the United States, and THE UNITED STATES OF AMERICA,
Defendant-Appellants,

and

WELLS FARGO BANK, N.A.;
and THE BANK OF CALIFORNIA, N.A.,
Defendants-Intervenors-Appellants.

Nos. 84-2622
84-2623

PARTIAL TRANSCRIPT OF ELECTRONIC TAPE RECORDINGS
MONDAY, AUGUST 12, 1985

REPORTED FROM ELECTRONIC TAPE RECORDING BY: CLINT MILLER

[material omitted]

created these investments or supervisory committees and we have quite an argument here that the effect of that is to dilute the role of the bank as trustee and in effect result in delegation of trust powers arguably to a supervisory committee which does not act in the same trust fiduciary responsibility.

Let me ask this question, since you're talking about ERISA. In Section 408 it's clear from reading 408 A5 in conjunction with 408 A2 that Congress contemplated that banks as trustees would have common investment funds, would be commingled as funds for investment purposes. My question of you is, if this Court, and I guess perhaps ultimately the Supreme Court, were to agree with the District Court in this case rather than the District Court in

the District of Columbia, would the banks be through, would the banks just be prohibited flatly from collectively investing IRA accounts?

MR. SULLIVAN: I think not.

THE COURT: How would they do it without running afoul of the law or running afoul of Glass-Steigel?

MR. SULLIVAN: It comes down to advertising. I think if they had them, kept them in the back room where someone got after some significant contact with the bank, that the person could ultimately learn about the product and could get into it.

THE COURT: Okay, that's one thing, but let's suppose the real reason for the Court's decision is the existence of the supervisory committee, not the promotion, then where are you?

MR. SULLIVAN: Well, I would—

THE COURT: Let's suppose that ultimately the Supreme Court were to decide that fine, it makes perfectly good sense to permit the banks to advertise the range of options available to IRA investors. All right, so we get that, but wait a minute, we decide that you are not really selling trust services because you have diluted your role as trustee by organizing these supervisory committees and we are having difficulty now distinguishing these collective investment trusts from the traditional mutual funds, which we said were subject to Camp, then where are you?

MR. SULLIVAN: I think we're at a point where the particular form has been undercut so the bank in this particular form can't do that, it would have to go back and obtain an exemption or perhaps not be able to offer it if the exemption was granted without registering, going through an elaborate process, but the point is, and, Your Honor, I would suggest a different interpretation on the dilution, as you call it—

THE COURT: I want to stick with the question that I have, you haven't really answered it, Counsel. Let me

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5019

INVESTMENT COMPANY INSTITUTE,
Appellant,

v.

C. T. CONOVER, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

In accordance with the provisions of Rule 29 of the Federal Rules of Appellate Procedure, the American Bankers Association hereby respectfully petitions the Court for leave to file the attached Brief as Amicus Curiae in support of the Appellees. The American Bankers Association is the largest national trade association of the commercial banks in the United States, including banks chartered by the Comptroller of the Currency ("national banks") and those chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia.

Since Individual Retirement Accounts ("IRAs") were created by the Employee Retirement Income Security Act of 1974, and most especially since IRA's were made more widely available after 1981, commercial banks represented by the American Bankers Association have been among the principal trustees holding such accounts for the American public. In order to achieve maximum efficiency in the administration of IRA trusts, and thus provide the greatest rate of return to IRA owners and their beneficiaries, it is desirable to commingle the assets of many individual accounts in a common trust or common investment fund. Such a

procedure is specifically authorized by Section 408(a)(5) of the Internal Revenue Code. The Comptroller of the Currency has approved the applications of several national banks to do precisely what the law authorizes—commingle the assets of various Individual Retirement Accounts in a common fund for investment. This case is one of three currently pending legal challenges to the Comptroller's actions. The commingled IRA account program of Citibank, N.A., was challenged unsuccessfully in the Court below, *Investment Company Institute v. Conover*, 596 F. Supp. 1496 (D.D.C. 1984). The similar programs of Wells Fargo Bank and Bank of California were successfully challenged in *Investment Company Institute v. Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), and that case is now on appeal. Litigation over the commingled IRA account program of Connecticut Bank & Trust Co. remains pending in the United States District Court for the District of Connecticut. *Investment Company Institute v. Conover*, Civil Action No. H-85-160 JAC (D. Conn. filed Feb. 26, 1985).

Obviously, therefore, this is an issue of nationwide importance to the banking industry. If the decision of the district court is reversed in this case, it would deprive commercial banks of the opportunity to offer a valuable service to their customers and deprive those customers of the benefits to be realized from that service.

[Reprinted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INVESTMENT COMPANY INSTITUTE,
Appellant,

v.

C. T. CONOVER,
COMPTROLLER OF THE CURRENCY, *et al.*,
Appellees.

No. 85-5019
Wednesday, December 11, 1985
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 10:15 a.m.

BEFORE:

CIRCUIT JUDGES SCALIA AND STARR.
(Senior Circuit Judge McGowan is also a member of this panel and will consider the case on the briefs and the tape recording of the oral argument.)

APPEARANCES:

HARVEY L. PITT, ESQ., Fried, Frank, Harris, Shriver & Jacobson, Suite 1000, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037; on behalf of Appellant

L. ROBERT GRIFFIN, ESQ., Office of the Comptroller of the Currency, Washington, D.C.; on behalf of Appellee, Comptroller of the Currency

[material omitted]

does?

MR. PITT: Well—

QUESTION: And I cannot imagine that the case is not such an important one that it bears a petition for certiorari to the Supreme Court. The Court is going to turn it down until there is a circuit conflict.

MR. PITT: I think Your Honor is correct, that this case we do perceive as being sufficiently important that a circuit conflict may not be necessary, although—

QUESTION: And either side is going to go up from the Ninth Circuit.

MR. PITT: I would assume that.

QUESTION: Has the case been argued incidentally in the Ninth Circuit?

MR. PITT: The case has been argued in the Ninth Circuit. It was argued on August 12th before Judges Norris, Reinhardt, and Coughenour who is a District Judge sitting by designation. The case is under submission. I might add, Your Honor, that after the initial decision came down from Judge Schwarzer in the Central District of California, we did two things. We asked the Comptroller if he would refrain from issuing additional rulings until we could get this issue resolved in the courts. We also sought to reach an agreement on the form of some kind of stay of proceeding and there was over the telephone an

Supreme Court, U.S.
FILED
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Nos. 86-152, 86-153 and 86-154

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,
Petitioner,

v.

ROBERT L. CLARKE, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, THE NINTH CIRCUIT AND THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether three Courts of Appeals correctly upheld rulings by the Comptroller of the Currency authorizing each of several national banks to establish a common fund for collective investment of assets held by the bank as trustee for IRA trusts.

PARTIES TO THE PROCEEDING

The petitioner in this action is the Investment Company Institute ("ICI"). The respondents are the Office of the Comptroller of the Currency, United States of America, Citibank, N.A., Wells Fargo Bank, N.A., The Bank of California, N.A., The Connecticut Bank & Trust Company, N.A. and The Connecticut Bank & Trust Company IRA Collective Investment Fund. The corporations affiliated with the bank respondents under Rule 28.1 of this Court are listed in Appendix 1 to this brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-152, 86-153 and 86-154

INVESTMENT COMPANY INSTITUTE,
Petitioner,

v.

ROBERT L. CLARKE, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, THE NINTH CIRCUIT AND THE SECOND CIRCUIT

Respondents Citibank, N.A., Wells Fargo Bank, N.A., The Bank of California, N.A., The Connecticut Bank & Trust Company, N.A. and The Connecticut Bank & Trust Company IRA Collective Investment Fund respectfully pray that the petitions for Writs of Certiorari to review the judgments and opinions of the United States Courts of Appeals for the District of Columbia Circuit, the Ninth Circuit and the Second Circuit, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (1a-23a)[1] is reported at

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[1] Citations herein to material printed in the appendix appears as (——a) or at ——a. Unless otherwise indicated (*e.g.*, Second Circuit Appendix ——a), citations are to the appendix to the petition for a writ of certiorari to the District of Columbia Circuit. *Investment Company Institute v. Clarke*, No. 86-152 (U.S. July 31, 1986).

790 F.2d 925. The opinion of the United States District Court for the District of Columbia (24a-38a) is reported at 596 F. Supp. 1496. The decision of the Comptroller of the Currency ("Comptroller") authorizing Citibank, N.A. to establish common trust funds for the collective investment of individual retirement account ("IRA") trusts (39a-51a) is unreported.

The opinion of the United States Court of Appeals for the Second Circuit (Second Circuit Appendix 1a-3a) is reported at 789 F.2d 175. The opinion of the United States District Court for the District of Connecticut (Second Circuit Appendix 4a-13a) is reported at 630 F. Supp. 593. The decision of the Comptroller relating to The Connecticut Bank & Trust Company, N.A. (Second Circuit Appendix 14a-35a) is unreported.

The opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit Appendix 1a-6a) is reported at 793 F.2d 220. The opinion of the United States District Court for the Northern District of California (Ninth Circuit Appendix 7a-27a) is reported at 593 F. Supp. 846. The decisions of the Comptroller relating to Wells Fargo Bank, N.A. (Ninth Circuit Appendix 30a-44a), and The Bank of California, N.A. (Ninth Circuit Appendix 45a-46a) are unreported.[2]

STATUTES INVOLVED

The statutes principally involved in this action are the provision of the National Bank Act authorizing banks to offer fiduciary services,[3] Sections 16 and 21 of the

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[2] All of the Comptroller's decisions may be found in the Appendix in each case. Petitioners have reproduced the court opinions only in the appendix pertaining to that case.

[3] 12 U.S.C. § 92a.

Glass-Steagall Act[4] and certain provisions of the Employees Retirement Income and Security Act (ERISA).[5] The text of relevant portions of these statutes is set out in Appendix 2.

STATEMENT OF THE CASE

The National Bank Act empowers national banks to offer trust services.[6] The Comptroller of the Currency is charged with the administration of the Act and the supervision of national banks. Petitioner trade association ("ICI") challenges a determination by the Comptroller that national banks serving as trustees for personal retirement trusts commonly known as IRAs may provide collective investment services.

IRA trusts are authorized by the Employee Retirement and Income Security Act (ERISA).[7] Under ERISA an individual may create a personal tax-exempt IRA trust under state law with a plan for distribution on retirement

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[4] The Glass-Steagall Act was enacted as part of the Banking Act of 1933, 48 Stat. 162, and is codified at various sections of Title 12 of the United States Code. The provisions relevant to this action are Sections 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378.

[5] Employment Retirement Income Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. The provisions principally relevant to this action are codified at 26 U.S.C. §§ 408(a), (e), (f) and (m) and 4975 (d)(8).

[6] 12 U.S.C. § 92a.

[7] Employment Retirement Income Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. Congress has encouraged the establishment of a variety of benefit programs including Keogh, stock bonus, pension, profit-sharing and other plans through the preferential tax treatment of qualifying plans under the Internal Revenue Code. IRC §§ 401(a), (c) and 501(a). ERISA is one of the series of statutes by which Congress has provided for such programs. IRAs and Keoghs are retirement savings plans established by individuals, while the other benefit plans are generally established by employers.

or death.[8] Funding of the trust is limited to modest annual contributions.[9] The individual creating the trust may direct the trustee in how to invest the trust assets. ERISA provides that a bank may serve as the IRA trustee, and authorizes the trustee to pool the assets of individual IRA trusts in a fund for collective investment.[10]

Each of the respondent national banks has offered to its IRA customers the opportunity to establish IRA trusts and have the bank, as trustee, place the IRA trust assets in a variety of permissible investments. Among these alternatives, each bank has established one or more collective funds to pool the assets of individual IRA trusts for common investment.[11] Before inaugurating its service, each bank received assurance from the IRS of tax qualification under ERISA, filed securities law registration statements required by the SEC, and applied to the

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[8] 26 U.S.C. (hereinafter "IRC") § 408.

ERISA imposes a number of restrictions "to insure that [an IRA] will be used for retirement savings" S. Rep. No. 383, 93d Cong., 1st Sess. 132 (1973). There are significant penalties for any distribution of funds from the trust other than at retirement age, or in the event of disability or death. IRC §§ 401(a), 408(a)(6) and 408(f). IRA trusts are not transferable to any other person and cannot be used as security for a loan. IRC § 408(e). ERISA also prohibits investment of IRA assets in ways thought to be inconsistent with IRAs' retirement savings purposes, such as in life insurance contracts or collectibles. IRC §§ 408(a)(3) and (m).

[9] IRC § 408(a)(1).

[10] IRC §§ 408(a) and (e)(6).

[11] The collective funds are also trusts. *See* Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trust [Assets] Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954 (October 21, 1982) (39a) and similar decisions with respect to Wells Fargo Bank, N.A. (52a), The Bank of California, N.A. (67a) and The Connecticut Bank & Trust Company, N.A. (69a) (hereinafter "Citibank Decision," "Wells Fargo Decision," "The Bank of California Decision" and "Connecticut Bank & Trust Decision").

Comptroller for a determination that the proposed trust service complied with the requirements of the National Bank Act and the Comptroller's Regulations.[12]

The Comptroller issued a detailed written decision for each application, and in each case he approved the proposed activity as a permissible bank trust service. He found that banks have traditionally used collective funds to invest trust assets. He determined that his Regulations specifically authorize banks to pool trust assets for investment and, in particular, to pool the assets received under tax-exempt statutory trusts such as those involved here.[13] The Comptroller also found overwhelming evidence that Congress intended banks to serve as trustees for IRA trusts and collectively invest the assets of these trusts through a common fund.[14] He concluded that the IRA collective trust service complied with his Regulations and was a proper manifestation of the trust powers affirmatively authorized for banks.[15]

The Comptroller's first decision concerned the application of Citibank, N.A.[16] Petitioner ICI challenged the

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[12] *See* Citibank Decision (39a); Wells Fargo Decision (52a); The Bank of California Decision (67a); Connecticut Bank & Trust Company Decision (69a).

[13] Citibank Decision at 40a; Wells Fargo Decision at 55a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 73a. *See* 12 C.F.R. § 9.18(a)(1) (collective investment of funds received in trust); 12 C.F.R. § 9.18(a)(2) (collective investment of assets of statutory tax-exempt plans).

[14] Citibank Decision at 42a ("[T]he overwhelming conclusion to be drawn from ERISA and its legislative history is that Congress believed it to be within the power of banks to serve as trustees for IRA trusts and to collectively invest the assets of those trusts in common trust funds or in collective investment funds for retirement plan assets."). *See* Wells Fargo Decision at 56a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 73a.

[15] Citibank Decision at 40a, 43a-45a; Wells Fargo Decision at 56a-57a, 63a, 65a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 73a, 82a, 85a-86a.

[16] Citibank Decision (39a).

Comptroller's ruling in an action in the District Court for the District of Columbia. It then challenged the succeeding rulings on the other bank applications in district courts in different circuits. The affected banks were parties in their respective cases. In each case, ICI claimed that the Comptroller's ruling was based upon an inappropriate interpretation of certain provisions of the Glass-Steagall Act.

The Glass-Steagall Act prohibits national banks from underwriting or issuing "securities".[17] When a bank commingles the assets of individual trusts for collective investment, the assets of each participating trust are exchanged for an undivided ownership interest in the common fund. ICI claimed that this "undivided interest" issued by the bank was a "security" for purposes of the Glass-Steagall Act, and that the bank was therefore precluded from establishing the common fund.

The Comptroller had carefully considered this possibility, and rejected it. In doing so, the Comptroller made three principal determinations:

> *First*, in discussing the applicable legal principles, the Comptroller found that the trust powers authorized under the National Bank Act and the banking Regulations embraced the use of a common fund, and that it had long been recognized that a national bank can, consistent with the banking laws (including the Glass-Steagall Act), commingle funds that it receives for bona fide fiduciary purposes. He therefore concluded that the relevant inquiry concerned the presence of bona fide fiduciary services.[18]
>
> *Second*, the Comptroller carefully examined the relationships between the bank trustee, the IRA participants, and the common fund. He found, both in law and in fact, that the bank was performing the

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[17] 12 U.S.C. §§ 24 (Seventh) and 378.

[18] Citibank Decision at 43a, 45a; Wells Fargo Decision at 60a-61a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 78a-79a.

functions of trustee and was commingling funds that it received for bona fide fiduciary purposes. The Comptroller believed that the Glass-Steagall inquiry was concluded by his determination that the proposed trust service was the manifestation of traditional, and bona fide, trust powers.[19]

Third, the Comptroller nonetheless proceeded to examine the safety and soundness of the proposed trust service in light of this Court's articulation in *Camp* [20] of the risks that the Glass-Steagall Act was designed to prevent. He took into account the requirements imposed by ERISA and other laws and experience in the history of the administration of bank common funds. The Comptroller concluded that the risks here were negligible or nonexistent and were not different from the risks engendered by banks' provision of other trust fiduciary services.[21]

The Comptroller's rulings and petitioner's contentions have now been reviewed and decided by three courts of appeals. Each court of appeals has affirmed the Comptroller's decisions.[22] (In a fourth proceeding, a district court in another circuit has also affirmed the Comptroller's

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[19] Citibank Decision at 43a; Wells Fargo Decision at 61a-63a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 79a-82a.

[20] *Investment Company Institute v. Camp*, 401 U.S. 617 (1971).

[21] Citibank Decision at 43a-45a; Wells Fargo Decision at 63a-65a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 82a-86a.

[22] The district courts in the Citibank and The Connecticut Bank & Trust cases upheld the Comptroller's decisions. The District of Columbia Circuit and the Second Circuit affirmed. The district court decision in the Wells Fargo Bank/The Bank of California case was the only case to upset any of the Comptroller's decisions. It was reviewed de novo and reversed by the Ninth Circuit. *See ICI v. Clarke*, Ninth Circuit Appendix at 1a-6a. Every court upholding the Comptroller's decisions has considered, and rejected, the analysis of the district court in the Wells Fargo Bank/The Bank of California case.

decision.[23]). The fullest exposition of the court's reasoning is contained in the opinion of the Court of Appeals for the District of Columbia Circuit.[24] ICI seeks a writ of *certiorari* to each court of appeals.

ICI has filed separate, but virtually identical petitions in the three cases. Respondent Comptroller and the respondent banks oppose *certiorari*. The bank respondents are filing this single opposition for all three cases.

REASONS FOR DENYING THE WRIT

The Comptroller of the Currency is charged with the administration of the National Bank Act and the supervision of national banks. The National Bank Act empowers banks to provide trust services. It is well established that this power embraces the authority to pool assets received in trust in a common fund for investment. The Comptroller carefully examined the IRA trust program and found it well within the parameters of bank trust powers.

The Comptroller's decision represents the application of settled principles of law and practice. Banks have, consistently with the Glass-Steagall Act, commingled trust assets for years and, in particular, have commingled funds when acting as fiduciary under statutory tax-exempt programs such as the program here. Congress has selected banks to perform this task and has regulated the bank commingled funds under the tax and securities laws. Until now, no lawsuit or administrative action has ever challenged the permissibility of such services by banks.

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[23] *See Investment Company Institute v. Clarke*, C.A. No. C-C-86-0032-M (W.D.N.C. August 20, 1986). On August 20, 1986 the district court issued a memorandum order granting defendants' motions for summary judgment and denying plaintiff's motion for summary judgment, thus upholding the Comptroller's ruling. The text of the court's memorandum order is reproduced in Appendix 3.

[24] 1a-23a.

The Comptroller based his decision on the affirmative grant of trust powers to national banks and the long established use of commingled funds for trust assets. He considered and applied this Court's decision in *Camp*, noting the sharp distinction drawn by the Court between a commingled fund anchored in the exercise of trust powers and one dedicated solely to gathering funds for unrestricted general investment. He properly concluded that the trust service offered here was a bona fide trust service both in fact and law, and was fully in accord with the Glass-Steagall Act.

The petition raises only one question: whether the Comptroller has articulated a reasonable basis to support his application of the national banking laws. Petitioner has raised its arguments in three separate cases in a vain effort to provoke a conflict in circuits. Petitioner's views have been completely aired before three courts of appeals and all have concluded that the Comptroller's decision should be upheld. There is clearly no issue warranting this Court's review.

A. The Comptroller's Decisions Represent the Application of Settled Principles of Law and Practice

The trust provisions of the national banking laws have coexisted with the prohibitions of the Glass-Steagall Act for more than fifty years. During this entire period of time, banks have used commingled funds in the performance of their trust functions.[25] The Federal Reserve

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[25] National banks began to organize common trust funds as early as 1927, in accordance with their general trust powers. *Investment Company Institute v. Camp*, 401 U.S. at 624. *See* Federal Reserve Act of 1913, § 11, 38 Stat. 261 (trust powers for national banks). The Glass-Steagall provisions were enacted in 1933.

Congress first addressed banks' collective investment of trust funds in favorable tax legislation in 1936. Revenue Act of 1936, § 169, Pub. L. No. 74-740, 40 Stat. 1708. The current version is codified at IRC § 584.

Board issued regulations expressly authorizing, and regulating, common investment of trust assets by national banks in 1936.[26] As this Court noted in its *Camp* decision in 1971, there is "no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." [27]

For decades national banks have served as fiduciaries for, and have used commingled funds for, Keogh plan trusts and other benefit and retirement trusts that qualify like IRA trusts for special tax treatment under the Internal Revenue Code.[28] As early as 1955 the Federal Reserve Board promulgated regulations specifically recognizing the propriety of banks' use of commingled funds for these tax-exempt trusts.[29] These regulations

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[26] 1 *Fed. Reg.* 417 (1936). The successor provision to that initial regulation is currently in effect as a regulation of the Comptroller. It provides:

> "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively . . . [i]n a common trust fund maintained by the bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, guardian or custodian under a uniform gifts to minors act."

12 C.F.R. § 9.18(a)(1). A separate section of the Comptroller's regulations authorizes commingling of the assets of statutory tax-exempt plans. *See infra* n.29.

[27] *Investment Company Institute v. Camp*, 401 U.S. at 624.

[28] *See* SEC Release No. 33-6188, 45 Fed. Reg. 8960, 8968 (1980); SEC, *Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 36 n.24 (1966); *see also Internal Revenue Code of 1954: Hearings Before the Senate Finance Comm. on H.R. 8300, Pt. 4*, 83d Cong., 2d Sess. 2115 (1954) (statement by the New York Bankers Association that in 1954, "[b]anks and trust companies administer probably more than 70 percent of the total assets in private employees trusts in the United States").

[29] 20 Fed. Reg. 3305 (1955). The successor provision to that initial regulation is currently in effect as a regulation of the Comptroller. It provides:

facilitated bank collective investment of trust assets under these programs by removing certain constraints upon the promotion and scope of the trust service.[30]

Over the years, as Congress has renewed and enlarged statutory benefit programs it has confirmed the propriety of bank collective funds to manage the assets of trusts established for these programs. When tax-exempt retirement plans were made available to self-employed individuals in the 1962 Keogh legislation,[31] Congress contemplated that those individuals would have access to retirement programs on a "reasonably similar basis" to that accorded corporate stockholder employees under prior programs, and specifically provided that banks would serve as trustees.[32] Banks rapidly began to offer their fiduciary and collective investment services for Keogh trusts.[33] When questions arose with respect to the status of the commingled funds under the securities laws (some banks had registered Keogh commingled funds, others had not), Congress acted in 1970 to "clarif[y] the status of . . .

> "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively . . . [i]n a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code."

12 C.F.R. § 9.18(a)(2).

[30] *See* 20 Fed. Reg. 3305 (1955). The current form of the regulations similarly relieves collective funds for statutory benefit trusts from certain restrictions regarding promotion and other matters that generally apply to collective funds for other bank trusts. *See* 12 C.F.R. § 9.18(b).

[31] Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809 (1962).

[32] *See* S. Rep. No. 992, 87th Cong., 1st Sess. 8 (1961); H.R. Rep. No. 378, 87th Cong., 1st Sess. 2-3 (1961). The provision dealing with banks' service as trustees is codified at IRC § 401(d)(1).

[33] *See* SEC Rel. No. 33-6188, 45 Fed. Reg. 8960, 8968 (1980); SEC, *Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 36 n.24 (1966).

bank collective funds" under those laws,[34] by giving the SEC authority to require registration where appropriate in order to protect settlors and beneficiaries of these trusts.[35]

Consistently with this history, when Congress enacted ERISA in 1974 it provided for banks to serve as trustees for individual IRA trusts[36] and collectively invest these assets through a common fund.[37] Congress noted that banks had similarly pooled individual retirement trusts under the Keogh and other benefit legislation,[38] and it intended that IRA trust funds "be invested in a wide variety of assets including . . . common trust funds maintained by banks."[39] ERISA's terms specifically au-

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[34] S. Rep. No. 184, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4897, 4898.

[35] Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1413.

[36] IRC § 408(a).

[37] ERISA specifically refers to collective funds in IRC §§ 408 (a)(5), (e)(6) and 4975(d)(8). The IRS has formally advised each bank respondent in these cases that its collective trust was qualified as a "collective investment trust" under § 408(a)(5) and would be so treated for tax purposes. *E.g.*, Joint Appendix A-388 to A-390, *ICI v. Conover*, 790 F.2d 925 (D.C. Cir. 1986).

[38] The Conference Report on ERISA observed: "The conferees understand that it is common practice for banks, trust companies, and insurance companies to maintain pooled investment funds for plans." It declared that ERISA approved such "pooled fund[s] maintained by a bank, etc., which is a plan fiduciary" since "generally the net effect of pooling plan assets is . . . more efficient investment management." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 316, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5096. In explaining the collective investment funds that were permitted, the Conference Report cited IRS rulings approving similar bank collective investment under other statutory tax-exempt programs. *See id.* (citing Rev. Rul. 56-267, 1956 C.B.-1 at 206).

[39] 119 Cong. Rec. 30,058 (1973) (remarks of Sen. Nelson, manager of the bill). Similarly, the Senate Finance Committee report on ERISA listed the investments available for IRA accounts and

thorize the transaction by which trust assets are transferred to the commingled funds by the "sale or purchase of an interest" in a "common or collective trust fund or pooled investment fund maintained by a . . . bank or trust company supervised by a State or Federal agency." [40]

Throughout this history, banks' collective funds for trust administration have also been subject to the federal securities laws. Interests in all collective funds are "securities" for securities laws purposes, and are subject to varying degrees of regulation.[41] The securities

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included "a common trust fund managed by a bank." S. Rep. No. 383, 93d Cong., 1st Sess. 132 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 5015.

[40] IRC § 4975(d)(8). This provision specifically authorizes the transaction in which the bank exchanges assets of an individual IRA trust for an interest in the common fund, by exempting that transaction from the self-dealing prohibitions in the Code that would otherwise apply. The Conference Report on this section stated that ERISA "allows the purchase and sale of interests in a pooled fund maintained by a bank." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 316, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5096. *See also* Staff of Joint Comm. on Internal Revenue Taxation, 93d Cong., 1st Sess., *Tax Treatment of Pension Plans, Part Two: Individual Retirement Accounts, Limitations on Contributions, and Lump Sum Distributions* 3 (Comm. Print 1973) (funds in IRA could be invested "in a common trust fund managed by a bank").

[41] Interests in common trust funds are "securities" under the securities laws. *See* Securities Act of 1933, § 2(1), 15 U.S.C. § 77b(1). Interests in a "common trust fund or similar fund" maintained by a bank for the collective investment of assets held by the bank as trustee, executor, administrator or guardian are exempt from registration under the Securities Act of 1933 ("1933 Act"). Securities Act of 1933, § 3(a)(2), 15 U.S.C. § 77c(a)(2). Interests in bank collective trust funds issued in connection with a "stock bonus, pension, or profit-sharing plan" qualifying under IRC

laws were enacted for purposes quite distinct from the purposes of the Glass-Steagall Act, and it has consistently been recognized that the interests in these commingled funds are not "securities" for Glass-Steagall Act purposes when the bank is offering bona fide trust services.[42]

In his decisions below, the Comptroller found that the proposed bank services were wholly in accord with ERISA and with the exercise of bank trust powers. He noted

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§ 401 are also exempt from registration under the 1933 Act. *Id.* Congress has left to the SEC authority to exempt interests in collective funds for Keogh trusts from registration under the 1933 Act. *Id.* A "common trust fund or similar fund" maintained by a bank for the collective investment of monies received by the bank as a trustee, executor, administrator or guardian is exempted from the definition of "investment company" under the Investment Company Act. 15 U.S.C. § 80a-3(c)(3). Similarly, bank collective funds consisting of the assets of qualified employees' stock bonus, pension or profit-sharing trusts, including Keogh plans, are exempted from the definition of "investment company" under the Investment Company Act. 15 U.S.C. § 80a-3(c)(11).

ERISA did not address the treatment under the securities laws of interests in collective funds for the assets of IRA trusts. The legislative history indicated that "[t]he Securities and Exchange Commission will have authority to act on the issues with respect to individual retirement accounts independently of this legislation." S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 338 (1973).

[42] Citibank Decision at 44a. *See generally* Connecticut Bank & Trust Decision at 86a-88a. The Glass-Steagall Act does not contain any definition of "security," nor does it adopt the definitions used in the federal securities laws.

As the Comptroller, and all the courts below, have noted: "The mere fact that interests in the [Collective] Trust qualify as 'securities' within the meaning of the securities laws does not mean that they are 'securities' forbidden to banks by the Glass-Steagall Act. Such a conclusion would . . . invalidate all bank collective investment vehicles" in contradiction to this Court's recognition in *Camp* that "there is no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." *Id.* at 87a; *see Camp*, 401 U.S. at 624.

that banks may clearly commingle funds received for bona fide fiduciary purposes and had no difficulty in concluding that those purposes were present here. The bank acts as IRA trustee by statutory mandate under ERISA; the terms of the Act call for a written trust agreement; the trusts employed by the bank are trusts under common law; and the bank is charged with the duties of trustee.[43] The trust assets are, in each case, placed in a fund that commingles only IRA trust assets and is dedicated to the preservation and investment of those assets for distribution in accordance with the terms of each trust upon retirement, disability or death.

The Comptroller went on to conclude that the Glass-Steagall Act did not prohibit the appropriate exercise of trust powers. That conclusion embodies settled principles of law and practice. The Act has never been construed to prohibit the commingling of assets received in trust for bona fide fiduciary purposes and, more particularly, assets of tax-exempt retirement trusts.[44] The propriety of the commingling is reflected in the regulations of the banking agencies and in the collective invest-

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[43] Citibank Decision at 41a-42a; Wells Fargo Decision at 53a-54a; Connecticut Bank & Trust Decision at 71a.

[44] ICI itself conceded below that a bank may lawfully commingle IRA trust assets "as an aid to the bank's administration of the individual trusts." Brief for Appellant at 41, *ICI v. Conover*, 790 F.2d 925. It similarly concedes in its Petitions in these cases that "a bank does not engage in . . . prohibited activities [under Glass-Steagall] when it . . . commingles the assets of preexisting [IRA] trusts in a common trust fund. Petition for Writ of Certiorari filed in *Investment Company Institute v. Clarke*, No. 86-152 (U.S. July 31, 1986) (D.C. Circuit Petition) at 14 n.19; Petition for Writ of Certiorari filed in *Investment Company Institute v. Clarke*, No. 86-153 (U.S. July 31, 1986) (Ninth Circuit Petition) at 15 n.18; Petition for Writ of Certiorari filed in *Investment Company Institute v. Clarke*, No. 86-154 (U.S. July 31, 1986) (Second Circuit Petition) at 12 n.17.

ment trust services that banks have long provided, consistent with the Glass-Steagall Act, for Keogh trusts and other trusts under programs continually renewed by Congress. Banks serving as statutory fiduciaries under these tax-exempt plans have managed billions of dollars in collective investment vehicles properly offered for decades without legal or administrative challenge.[45]

B. The Comptroller's Decisions Are Wholly In Accord With This Court's Decision In *ICI v. Camp*

In *ICI v. Camp*[46] this Court considered the application of the Glass-Steagall Act to a novel bank plan to market interests in a common fund for unrestricted general investment by the public. Customers participated in the investment fund by designating the bank as their managing agent to purchase shares in the bank's common fund.[47] The customer was free to pledge or transfer his shares in the investment fund to any person or to redeem them at any time.[48] Participation in the investment fund was unrelated to any trust relationship or any other bank service.

The Court noted that the Glass-Steagall Act was generally designed to separate commercial banking from investment banking.[49] It said that commercial banking included the exercise of trust powers and it was well established that banks were authorized to use common funds for this activity.[50] In the Court's view, there was "no reason to doubt" that the Glass-Steagall Act permitted

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[45] *See Final Report of the SEC on Bank Securities Activities* in SEC, *Reports on Bank Securities Activities*, 95th Cong., 1st Sess. (1977) at 453.

[46] 401 U.S. 617.

[47] *Id.* at 622-23.

[48] *Id.* at 622.

[49] *Id.* at 629.

[50] *Id.* at 624-25.

a bank to commingle assets received for bona fide trust purposes.[51] However, the Court found that the managing agency commingled fund at issue in *Camp* was a new concept which did not involve either the offering of trust services or any other form of commingling established in commercial bank practice.[52] Despite the novelty of the bank's program, the Comptroller had not offered any "expressly articulated position" concerning the applicability of the Glass-Steagall Act.[53] Accordingly, the Court undertook its own analysis of the application of the Act's policies and concluded that the bank's fund involved a potential for abuse and risks to the bank that the Glass-Steagall Act was intended to avoid.[54]

The Comptroller carefully applied the principles stated by this Court in *Camp*. First, he looked to determine whether the IRA trust assets were received for bona fide trust purposes and he concluded that they were. That was the proper inquiry for, as this Court made clear in *Camp*, there is no doubt about the authority of a bank to commingle funds received for bona fide trust purposes.[55] Second, he examined the relationship between the IRA trust and the commingled fund and concluded that the fund in fact provided for the management of assets and their distribution in accordance with the terms of the trust upon retirement, disability or death. Under *Camp*, that inquiry established that the fund was dedicated to carry out the purposes of the IRA trusts rather than offering some investment service extraneous to banking powers. Third, he found that the use of commingled funds for retirement trusts had long been an established bank trust practice clearly within the ambit of customary bank activities.

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[51] *Id.* at 624-25.

[52] *Id.* at 624-25.

[53] *Id.* at 627.

[54] *Id.* at 634-38.

[55] *Id.* at 624.

The Comptroller properly concluded that these considerations were dispositive. They removed the infirmities that led the Court in *Camp* to take the additional step of measuring a novel bank commingled fund, approved without explanation, against concerns to which the Glass-Steagall Act was directed. He nevertheless proceeded also to examine the IRA trust service in light of those concerns and concluded that the potential for abuse or risk to the bank was negligible.

The Comptroller's assessment of these risks rested on the limitations imposed on the commingled IRA fund by ERISA and other requirements of law and upon his experience in dealing with issues of bank confidence and safety in the long history of supervision of common trust funds administered by banks. The courts below found that the Comptroller's evaluation was appropriate and dealt with complex matters particularly within his expertise.[56] The Court of Appeals for the District of Columbia Circuit specifically addressed the Comptroller's analysis of the *Camp* case. It confirmed that there were significant differences between the IRA common fund and the managing agency common fund and that those differences diminished the concerns articulated by this Court in *Camp*.[57] It focused particularly upon the "promotional pressures" discussed in *Camp* and noted that the Comptroller had carefully evaluated each in reaching his conclusion.[58] The Court viewed this evaluation as "eminently reasonable." [59]

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[56] *ICI v. Conover* at 19a-23a (D.C. Circuit decision); *ICI v. Clarke*, Ninth Circuit Appendix at 3a (Ninth Circuit decision); *ICI v. Clarke*, Second Circuit Appendix at 2a-3a (Second Circuit decision); *ICI v. Clarke*, Second Circuit Appendix at 5a-7a (District of Connecticut decision).

[57] *ICI v. Conover* at 8a-11a.

[58] *Id.* at 21a-22a.

[59] *Id.* at 21a.

There is no need for this Court now to review these determinations by the Comptroller. The Comptroller's decisions are fully consistent with the principles and concerns identified in *Camp*, and they are in accord with longstanding regulatory standards. They follow manifest Congressional intention. Three Courts of Appeals have scrutinized the Comptroller's conclusions on these matters, and have uniformly affirmed their propriety. No further judicial consideration is necessary.

CONCLUSION

For the foregoing reasons, the writs of certiorari should be denied.

Respectfully submitted,

/s/ Arnold M. Lerman

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APPENDICES

APPENDIX 1

Pursuant to Rule 28.1 of this Court respondents state that the corporations affiliated with them within the meaning of the rule are as follows:

Citibank, N.A.

ARRENDADORA INCI, S.A. DE C.V.
ARRENDADORA Y ADMINISTRADORA CITYCOL S.A.
BANCO INTERNACIONAL DE COLOMBIA (NASSAU) LIMITED
BANCO INTERNACIONAL DE COLOMBIA, S.A.
CENTRAL HOLDINGS CORPORATION
CITICO
CITYTRUST REALTY CORPORATION
CLARKE VICKERS LIMITED
CLARKE VICKERS SERVICES PTY. LIMITED
COMPANIA COLOMBIANA DE FINANCIAMIENTO COMERCIAL S.A.
COMPANIA EXPORTADORA CITYEXPORT S.A.
FIL-INSURE BROKERS, INC.
FINANCIERA CITICORP S.A.
FIRST CITICORP LEASING, INC.
GLOBAL ELECTRONIC MARKETS COMPANY
ISLAND FINANCE CORPORATION
MAGHREB FINANCE S.A.
NIGERIA INTERNATIONAL BANK, LIMITED
ONE SANSOME STREET ASSOCIATES INC.
ORIENT PACIFIC CAPITAL INVESTMENT CORPORATION
SAUDI AMERICAN BANK
TAIWAN FIRST INVESTMENT & TRUST CO., LTD.

Wells Fargo Bank, N.A.

WELLS FARGO & COMPANY

The Bank of California, N.A.

MITSUBISHI BANK, LIMITED
BANCAL TRI-STATE CORPORATION

The Connecticut Bank & Trust Company

BANK OF NEW ENGLAND CORPORATION

APPENDIX 2

A. The principally relevant provisions of ERISA are 26 U.S.C. §§ 408(a), (e), (f) and (m) and 4975(d)(8):

§ 408. Individual retirement accounts

(a) Individual retirement account—For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(a)(5), 402(a)(7), 403(a)(4) or 403(b)(8), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year in excess of $2,000 on behalf of any individual.

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) (relating to required distributions) shall apply to

the distribution of the entire interest of an individual for whose benefit the trust is maintained.

* * * *

(e) Tax treatment of accounts and annuities.—

(1) Exemption from tax.—Any individual retirement account is exempt from taxation under this subtitle unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

(2) Loss of exemption of account where employee engages in prohibited transaction.—

(A) In general.—If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year. For purposes of this paragraph—

(i) the individual for whose benefit any account was established is treated as the creator of such account, and

(ii) the separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.

(B) Account treated as distributing all its assets. —In any case in which any account ceases to be an individual retirement account by reason of subparagraph (A) as of the first day of any taxable year, paragraph (1) of subsection (d) applies as

if there were a distribution on such first day in an amount equal to the fair market value (on such first day) of all assets in the account (on such first day).

(3) Effect of borrowing on annuity contract.—If during any taxable year the owner of an individual retirement annuity borrows any money under or by use of such contract, the contract ceases to be an individual retirement annuity as of the first day of such taxable year. Such owner shall include in gross income for such year an amount equal to the fair market value of such contract as of such first day.

(4) Effect of pledging account as security.—If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

(5) Purchase of endowment contract by individual retirement account.—If the assets of an individual retirement account or any part of such assets are used to purchase an endowment contract for the benefit of the individual for whose benefit the account is established—

(A) to the extent that the amount of the assets involved in the purchase are not attributable to the purchase of life insurance, the purchase is treated as a rollover contribution described in subsection (d)(3), and

(B) to the extent that the amount of the assets involved in the purchase are attributable to the purchase of life, health, accident, or other insurance, such amounts are treated as distributed to that individual (but the provisions of subsection (f) do not apply).

(6) Commingling individual retirement account amounts in certain common trust funds and common investment

funds.—Any common trust fund or comomn investment fund of individual retirement account assets which is exempt from taxation under this subtitle does not cease to be exempt on account of the participation or inclusion of assets of a trust exempt from taxation under section 501(a) which is described in section 401(a).

(f) Additional tax on certain amounts included in gross income before age 59½—

(1) Early distributions from an individual retirement account, etc.—If a distribution from an individual retirement account or under an individual retirement annuity to the individual for whose benefit such account or annuity was established is made before such individual attains age 59½, his tax under this chapter for the taxable year in which such distribution is received shall be increased by an amount equal to 10 percent of the amount of the distribution which is includible in his gross income for such taxable year.

(2) Disqualification cases.—If an amount is includible in gross income for a taxable year under subsection (e) and the taxpayer has not attained age 59½ before the beginning of such taxable year, his tax under this chapter for such taxable year shall be increased by an amount equal to 10 percent of such amount so required to be included in his gross income.

(3) Disability cases.—Paragraphs (1) and (2) do not apply if the amount paid or distributed, or the disqualification of the account or annuity under subsection (e), is attributable to the taxpayer becoming disabled within the meaning of section 72 (m)(7).

* * * *

(m) Investment in Collectibles Treated as Distributions.—

(1) In general.—The acquisition by an individual retirement account or by an individually-directed account under a plan described in section 401(a) of any collectible shall be treated (for purposes of this section and section 402) as a distribution from such account in an amount equal to the cost to such account of such collectible.

(2) Collectible defined.—For purposes of this subsection, the term "collectible" means—

(A) any work of art,

(B) any rug or antique,

(C) any metal or gem,

(D) any stamp or coin,

(E) any alcoholic beverage, or

(F) any other tangible personal property specified by the Secretary for purposes of this subsection.

* * * *

§ 4975. Tax on prohibited transactions

(d) Exemptions.—The prohibitions prescribed in subsection (c) shall not apply to—

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

B. The relevant provisions of the Glass-Steagall Act are Sections 16 and 21, codified at 12 U.S.C. §§ 24 (Seventh) and 378:

Section 16 of the Act provides, in part:

[A national bank] shall not underwrite any issue of securities or stock . . . .

Section 21 of the Act provides, in part:

[It] shall be unlawful . . . [f]or any . . . corporation . . . engaged in the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits . . . .

C. 12 U.S.C. § 92a provides:

Trust Powers

(a) Authority of Comptroller of the Currency

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

Civil Action No. C-C-86-0032-M

INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

ROBERT L. CLARKE, *et al.*,
Defendants.

MEMORANDUM ORDER

In this action, plaintiff, the Investment Company Institute, has challenged the November 25, 1985 decision of the Office of the Comptroller of the Currency to approve the application of the First Union National Bank to establish the First Union Fund. The First Union Fund is a Collective Trust for the commingling and collective investment of the assets of Individual Retirement Account trusts. Plaintiff contends that the decision of the Comptroller is arbitrary, capricious, an abuse of discretion, and contrary to law because, plaintiff alleges, the establishment of the First Union Fund violates the Glass-Steagall Act, *see* 12 U.S.C. §§ 24 (seventh), 378, and certain of the Comptroller's regulatory requirements. *See* 12 C.F.R. 9.18.

The parties have filed cross-motions for summary judgment. The Court has reviewed the undisputed facts, the administrative record of the Office of the Comptroller, and the extensive briefs of the parties. The Court heard argument on the cross-motions on July 30, 1986.

Upon his review of the application of First Union Bank, the Comptroller articulated a reasoned basis, in which he fully considered the applicable law, for his decision to approve the application. Deference should be shown to the Comptroller of the Currency, whose decisions concerning the banking laws should be upheld if they are reasonable and not contrary to law. The Court has reviewed the decision of the Comptroller and finds that the Comptroller's decision to approve the application of the First Union National Bank is reasonable, is not an abuse of discretion, and is not contrary to law. Furthermore, the same issue has been decided by three United States Courts of Appeals, and those courts have upheld like decisions by the Comptroller. *See Investment Company Institute v. Clarke*, 793 F.2d 220 (9th Cir. 1986); *Investment Company Institute v. Conover*, 790 F.2d 925 (D.C. Cir. 1986); *Investment Company Institute v. Clarke*, 789 F.2d 175 (2d Cir. 1986).[1]

Accordingly, defendants' motions for summary judgment are granted, plaintiff's motion for summary judgment is denied, and this action is dismissed.

It is so ordered.

Date: August 20, 1986

/s/ _____

JAMES B. MCMILLAN
United States District Judge

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[1] The Comptroller raised in his answer, but the parties did not brief, the issue of collateral estoppel. The Court, therefore, did not reach the issue of whether plaintiff, in view of the three Courts' of Appeals decisions, should be collaterally estopped from bringing this action.

Nos. 86-152, 86-153 and 86-154

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE, PETITIONER

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, ET AL.

INVESTMENT COMPANY INSTITUTE, PETITIONER

v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA, SECOND, AND NINTH CIRCUITS

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts of appeals correctly held that the Glass-Steagall Act, 12 U.S.C. 24 (Seventh), 377, 378 and 78, does not prohibit national banks from establishing a common trust consisting of the trust assets of Individual Retirement Accounts.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-152

INVESTMENT COMPANY INSTITUTE, PETITIONER

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OF THE CURRENCY, ET AL.

No. 86-153

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA, SECOND, AND NINTH CIRCUITS

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

In No. 86-152, the opinion of the court of appeals (Pet. App. 1a-23a) is reported at 790 F.2d 925. The opinion of the district court (Pet. App. 24a-38a) is reported at 596 F. Supp. 1496. In No. 86-153, the opinion of the court of ap-

peals (Pet. App. 1a-6a) is reported at 793 F.2d 220. The opinion of the district court (Pet. App. 7a-27a) is reported at 593 F. Supp. 846. In No. 86-154, the opinion of the court of appeals (Pet. App. 1a-3a) is reported at 789 F.2d 175. The opinion of the district court (Pet. App. 4a-11a) is reported at 630 F. Supp. 593.

JURISDICTION

In No. 86-152, the judgment of the court of appeals was entered on May 20, 1986. In No. 86-153, the judgment of the court of appeals was entered on June 30, 1986. In No. 86-154, the judgment of the court of appeals was entered on May 2, 1986. The petitions for writs of certiorari were filed on July 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1913, Congress gave national banks the authority to exercise trust powers under the supervision of the Federal Reserve Board. See Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 262. In 1936, the Board specifically authorized national banks to establish common trust funds. See 1 Fed. Reg. 417 (1936). Such a fund is a device by which a bank commingles the assets of individual trusts to be invested collectively as a single trust. See 12 C.F.R. 9.18(a)(1). The bank, as trustee, exchanges the assets of each participating trust for an undivided interest in the common trust that is proportionate to the assets contributed by the individual participating trust. See 1 Fed. Reg. 420 (1936).[1]

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[1] In 1962, Congress transferred to the Comptroller of the Currency the authority to supervise the trust activities of national banks. See Pub. L. No. 87-722, § 1, 76 Stat. 668, codified at 12 U.S.C. 92a. The Comptroller's present regulations authorizing banks to maintain common trust funds are codified at 12 C.F.R. 9.18.

For many years, national banks have used the common trust fund as a vehicle to commingle and invest the assets of various employee retirement programs. See *Internal Revenue Code of 1954: Hearings on H.R. 8300, Before the Senate Comm. on Finance,* 83d Cong., 2d Sess. Pt. 4 2115-2116 (1954). These funds, consisting of the assets of employee retirement programs, are common trusts, often referred to as collective investment trusts. See 12 C.F.R. 9.18(b); 20 Fed. Reg. 3305 (1955). As Congress expanded the class of employee retirement plans, banks continued to invest plan assets in common trust funds. After the passage of Keogh legislation in 1962 permitting self-employed individuals to establish their own retirement plans (see Pub. L. No. 87-792, 76 Stat. 809 *et seq.*), for example, banks, as trustees, invested the assets of individual Keogh plans in bank common trust funds. See H.R. Rep. 2337, 89th Cong., 2d Sess. 36 n.24 (1966); 45 Fed. Reg. 8960, 8968 (1980).

In 1974, as part of the Employees Retirement Income and Security Act (ERISA), 26 U.S.C. 401 *et seq.*, Congress created another form of employment-related retirement trust, the so-called individual retirement account (IRA). ERISA requires that each IRA be established by a written trust agreement, and provides that only banks (or other persons specially approved by the Secretary of the Treasury) may serve as IRA trustees. See 26 U.S.C. 408(a). ERISA also expressly provides that a bank may commingle individual IRA trust assets "in a common trust fund or common investment fund." 26 U.S.C. 408(a)(5).[2] In 1981, Congress amended ERISA to increase substan-

[2] ERISA includes numerous restrictions to ensure that an IRA trust is used solely for retirement purposes. Among other things, IRA trust assets may not be invested in items unsuitable for retirement purposes. See 26 U.S.C. 408(a)(3) and (m). In addition, a 10% penalty is imposed on any distribution of IRA trust assets before the settlor reaches age 59½. 26 U.S.C. 408(f).

tially both the number of people who may open IRAs and the amount that each individual may contribute annually to his IRA. See Pub. L. No. 97-34, § 311, 95 Stat. 274; 26 U.S.C. 408(a)(1).

2. Citibank is a national bank located in New York. In 1982, Citibank established its current IRA trust program. Among the IRA trust alternatives offered by Citibank is a common trust fund known as the Collective Investment Trust, which consists of the commingled assets of individual IRAs. Each participating IRA receives a proportionate interest in the Collective Trust, the assets of which are invested in several stock portfolios. Citibank is the trustee of the common trust and acts as investment advisor, administrator, and custodian of the trust.[3] Pet. App. 4a-5a.[4]

On October 21, 1982, the Comptroller of the Currency approved Citibank's application to offer the Collective Trust for IRA trusts (Pet. App. 39a-51a). The Comptroller first determined that, because Citibank's Collective Trust was a common trust within the meaning of his regulations, Citibank had the authority to offer it as a fiduciary service (see *id.* at 40a). Relying on this Court's decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), the Comptroller then concluded that "the prohibitions of the Glass-Steagall Act [12 U.S.C. 24 (Seventh), 377, 378, and 78] do not apply to a bank's collectively investing IRA trust assets in the manner proposed here" (Pet. App. 42a), In *Camp*, the Comptroller noted, this Court held that the Glass-Steagall Act prohibited a national bank from marketing securities representing interests in collectively invested funds held by the bank in

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[3] The Collective Trust is a common trust fund under the Comptroller's regulation (12 C.F.R. 9.18(a)) and is established as a trust under New York law.

[4] Unless otherwise noted, citations to "Pet. App." and "Pet." are to those filed in No. 86-152.

managing agency accounts (*id.* at 42a-43a). But in invalidating that commingling of managing agency accounts, the Comptroller explained, the Court in *Camp* specifically indicated that " '[f]or at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds' " (*id.* at 43a (quoting *Camp*, 401 U.S. at 624)). Thus, the Comptroller emphasized, the Court in *Camp* "recognized that banks have traditionally commingled trust assets, thereby distinguishing the offering of such fiduciary services from the commingled agency account in [*Camp*]" (Pet. App. 42a). The Comptroller accordingly concluded that "[s]ince the IRA assets in the present case will be received by the Bank as trustee, in both a common-law sense and within the meaning of ERISA, the collective investment of IRA trust assets * * * is clearly sanctioned by * * * *ICI* v. *Camp*" (*id.* at 43a).

The Comptroller went on to reject the proposition that the registration of the IRA trusts (as well as of participations in the common fund) under the Securities Act established that the bank was issuing "securities" for purposes of the Glass-Steagall Act (Pet. App. 43a-44a). The Comptroller noted that "[t]his Office has viewed the meaning of the term 'securities' under the securities laws as not necessarily synon[y]mous with its meaning under the Glass-Steagall Act," explaining that "when, as in the present case, the 'securities' merely represent the formal manifestation of a traditional banking service, * * * the prohibitions of the Glass-Steagall Act are not applicable" (*id.* at 44a).

While this analysis was enough to dispose of the possibility that the Glass-Steagall Act bars Citibank's operation of the Collective Trust, the Comptroller alternatively considered whether the bank's trust activities would implicate the potentials for abuse that concerned

this Court in *Camp* (see Pet. App. 44a-45a). The Comptroller concluded that those potential difficulties were "nonexistent or negligible in the context of commingled IRA trusts" (*id.* at 44a), explaining that the restrictions on the operation of IRA trusts—as well as "[t]he insulation of the trust department from confidential information obtained in the commercial lending business"—reduces the likelihood of abuse (*id.* at 45a).

On the basis of his reasoning in the decision approving Citibank's application, the Comptroller subsequently issued opinions appoving the applications of Wells Fargo Bank (see Pet. App. 52a-66a), Bank of California (*id.* at 67a-68a), and the Connecticut Bank and Trust Company (*id.* at 69a-90a) to offer identical IRA common trust services.

3. Petitioner, a trade association of investment companies, investment advisers, and underwriters, brought three separate actions challenging the Comptroller's decisions in the United States District Courts for the District of Columbia, the Northern District of California, and the District of Connecticut. In each case, petitioner asserted that the Glass-Steagall Act prohibits national banks from commingling the assets of IRA trust accounts. In particular, petitioner argued that, in commingling IRA trust assets and giving each settlor a participating interest in the common trust fund, the bank was engaged in the "underwriting" and "distributi[on]" of "securities," activities forbidden to national banks by Sections 16 and 21 of the Glass-Steagall Act (12 U.S.C. 24 (Seventh), 378).

a. In No. 86-152, which involves the challenge to Citibank's common IRA trust, the United States District Court for the District of Columbia rejected petitioner's Glass-Steagall claim (Pet. App. 24a-37a). The court reasoned that the Comptroller's interpretation was supported by *Camp*, which had expressly approved of a bank's commingling of assets held in a common trust (*id.*

at 30a). The court also rejected as inconsistent with *Camp* petitioner's argument that registration of the participations in the IRA common trust as securities under the Securities Act established that the bank was underwriting "securities" within the meaning of the Glass-Steagall Act. The court reasoned that the definition of "securities" in the Securities Act is broad enough to include *all* interests in bank common trust funds. See *ibid.* Thus, the court observed, accepting petitioner's contention would mean that *all* bank common trust activities would be barred by the Glass-Steagall Act. Such a result, the court concluded, was inconsistent with *Camp*, where the Court made clear that a bank may commingle trust assets for a fiduciary purpose. See *ibid.*

The court then analyzed (Pet. App. 33a-35a) Citibank's IRA trust activities in light of the potential hazards that concerned the Court in *Camp*. The court noted that both ERISA and the Comptroller's regulations place stringent limitations on Citibank's activities, prohibiting loans by Citibank to the trust or to individuals holding an interest in the trust, and ensuring that the bank offers only trust services (*id.* at 34a-35a). The court therefore found that the only risks involved in Citibank's operation of an IRA common trust are those present "when a bank engages in its customary fiduciary functions" (*id.* at 35a). For these reasons, the court concluded that "the Comptroller was correct and acted reasonably when he ruled that the Citibank [trust] involved none of the Glass-Steagall hazards enumerated in *Camp*" (*ibid.*).

The District of Columbia Circuit affirmed (Pet. App. 1a-23a). Initially, the court rejected petitioner's argument that the Comptroller's ruling was invalid under *Camp*, finding Citibank's fund "quite distinct from the funds at issue in *Camp*" (*id* at 8a). See *id.* at 8a-12a. The court noted that in this case Citibank sought to commingle IRA trust assets in a common trust—an activity specifically ap-

proved in *Camp*—and that Citibank serves as trustee, rather than managing agent, of the common fund. *Id.* at 8a-9a. The court also noted that accepting petitioner's broad reading of the word "securities" in the Glass-Steagall Act would effectively prohibit all commingling of trust funds by banks. This, the court concluded, was inconsistent with the express approval of such activities in *Camp*. See *id.* at 11a-12a.[5]

The court then turned to the Comptroller's opinion. While it found that neither the language (Pet. App. 14a-16a) nor the legislative history (*id.* at 16a-17a) spoke to the precise question at issue here, the court found that the Comptroller's "thorough justification of his conclusion is quite reasonable" (*id.* at 22a). The court noted that the Comptroller, in approving the Citibank fund, had followed the analysis set out in *Camp* (*id.* at 19a-20a). The court also rejected petitioner's argument that the individual IRA trusts were not in fact offered for fiduciary

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[5] The court also identified other significant differences between this case and *Camp*. First, the court noted (Pet. App. 10a) that IRA contributions are limited to $2,000, while investors in *Camp* could invest up to $500,000 (see 401 U.S. at 622). This small amount contributed by each individual here, the court concluded, made it unlikely that a bank would be tempted to engage in unsound lending practices to attract borrowers. Second, the court noted (Pet. App. 10a) that under ERISA (26 U.S.C. 408(e)(4)) units in Citibank's trust could not be used as collateral, in contrast to the units of participation issued in *Camp*. Thus, the bank could not finance purchases of units in the trust by a loan secured with units already held. Third, the court observed (Pet. App. 10a) that, unlike those in *Camp* (see 401 U.S. at 622), the units in Citibank's common trust were nontransferable, permitting Citibank to retain control over the size of the trust. Finally, the court noted (Pet. App. 10a-11a) that the 10% penalty imposed by ERISA for early withdrawals from an IRA significantly reduces the risk that Citibank will be called upon to redeem a large number of units at any time, a fear present in *Camp* (see 401 U.S. at 636).

purposes (*id.* at 20a-21a). Finally, the court rejected (*id.* at 22a) petitioner's contentions that the Comptroller had disregarded the hazards discussed in *Camp*, had based his decision on a disagreement with *Camp* or the congressional intent underlying the Glass-Steagall Act, and had attempted to substitute a regulatory scheme for the statutory limits in the Glass-Steagall Act. The court found that these claims were based on "mischaracterization[s] of the Comptroller's ruling" (*ibid.*).

b. In No. 86-153, petitioners brought an action in the United States District Court for the Northern District of California challenging the permission granted Wells Fargo Bank and Bank of California by the Comptroller to operate IRA common trusts (Pet. App. 52a-66a, 67a-69a). The district court invalidated the Comptroller's decision (86-153 Pet. App. 7a-27a). A divided panel of the Ninth Circuit reversed (*id.* at 1a-6a). The court of appeals noted that "the issue the Comptroller was required to decide essentially involved questions of expert judgment regarding the practical operation of the banking industry and the results that might be anticipated if particular business practices were instituted" (*id.* at 3a). After considering the language of the statute and the rationale set forth in the Comptroller's opinion, the court concluded that "we cannot say that the analysis and conclusions set forth in the Comptroller's decisions are unreasonable" (*ibid.*).

c. In No. 86-154, petitioner brought an action in the United States District Court for the District of Connecticut challenging the Comptroller's decision to grant the IRA trust application filed by the Connecticut Bank and Trust Company (see Pet. App. 69a-90a). The district court upheld the Comptroller's ruling. 86-154 Pet. App. 4a-12a. The court first noted (*id.* at 6a) that this Court's decision in *Camp* made clear that banks may commingle trust funds. The court then rejected petitioner's contention that the bank had not received the IRA funds for a true

fiduciary purpose. *Id.* at 7a-8a. Finally, the court held that the "concerns that motivated the Congress to adopt the Glass-Steagall Act are no more present in the [IRA trust] Fund than in the traditional common trust funds * * * whose legality is conceded by [petitioner]" (*id.* at 9a). The Second Circuit affirmed for the reasons given by the district court (*id.* at 1a-3a).

ARGUMENT

In the decisions below, the courts of appeals unanimously rejected petitioner's claim that the Glass-Steagall Act prohibits a national bank from pooling IRA trusts into a common trust fund. These decisions plainly are correct. They are consistent with, and indeed are compelled by, this Court's decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), which made clear that nothing in the Glass-Steagall Act prohibits national banks from commingling assets held in trust and placing these commingled assets into a common trust. In these circumstances, further review is not warranted.[6]

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[6] Given the unanimity among the circuits, there is no merit to petitioner's call (Pet. 10-11) for guidance from this Court. By splicing together quotations and taking them out of context, petitioner tries to create the impression (Pet. 11 n.14) that some court of appeals judges have called for this Court to review the matter. For example, petitioner claims that Justice (then Judge) Scalia stated that the case is " 'such an important one that it bears a petition for certiorari' " (Pet. 11 n.14, quoting Pet. App. 117a). Petitioner fails to note the remainder of Justice Scalia's comment: "The Court is going to turn it down until there is a circuit conflict" (Pet. App. 117a). Petitioner also states that "the Ninth Circuit agreed that the issues raised should be decided 'ultimately [by] the Supreme Court' " (Pet. App. 11 n.14, quoting Pet. App. 113a). The Court will search in vain for any such comment by the Ninth Circuit. In fact, the comment made by one of the Ninth Circuit judges during oral argument was "[l]et's *suppose* that ultimately the Supreme Court *were to decide* [the issue]" (Pet. App. 113a (emphasis added)).

1. Petitioner's primary argument (Pet. 12-13) is that the Comptroller's decision authorizing national banks to pool trust assets conflicts with this Court's decision in *Investment Company Institute* v. *Camp, supra.* In fact, as the courts of appeals uniformly recognized, the decision in *Camp* directly supports the Comptroller's decision.

a. In *Camp,* the Court addressed a plan in which numerous individual investors each tendered between $10,000 and $500,000 to a bank together with an authorization making the bank the investor's managing agent. See 401 U.S. at 622. The bank pooled these individual contributions into a single fund, which it then invested. The bank also issued units of participation representing each customer's share of the fund's assets. *Ibid.* The bank did not receive the investors' money in trust (*id.* at 622 n.8). The investors' interests in the fund were freely redeemable by the customer at any time, and were freely transferable (*id.* at 622). In these circumstances, the Court held that the bank's activities constituted a violation of Sections 16 and 21 of the Glass-Steagall Act. The Court reasoned that the activities engaged in by the bank were similar to the offering of shares in a mutual fund, the business of investment banking. See *id.* at 625, 629-630.

In reaching this result, however, the Court in *Camp* expressly contrasted the impermissible pooling of money for investment purposes with the permissible and well-established pooling and collective investment of trust assets. The Court specifically noted that "[f]or at least a generation * * * there has been no doubt that a national bank can, consistently with the banking laws, commingle trust funds," and that "[n]o provision of the banking law suggests that it is improper for a national bank to pool trust assets * * *." *Camp,* 401 U.S. at 624-625. Since deciding *Camp,* the Court has reaffirmed that nothing in

the Glass-Steagall Act prohibits banks from commingling and investing the trust funds of customers. See *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 55 (1981).[7]

It accordingly is manifest that the Comptroller's decision to permit national banks to commingle the assets of their IRA trusts is supported by this Court's decision in *Camp*. The Comptroller has authorized banks to "pool trust assets" (*Camp*, 401 U.S. at 625), the very activity that

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[7] Petitioner repeatedly claims (Pet. 12-13) that the Glass-Steagall Act and this Court's decisions in *Camp* and *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137 (1984), flatly prohibit banks from underwriting securities. This assertion, however, simply begs the question whether the commingling of IRA trust assets by the bank in fact constitutes the unlawful underwriting of securities. As our discussion of *Camp* demonstrates, this Court already has recognized the legality of this activity. Moreover, petitioner's repeated contention (Pet. 12, 14) that there is no trust "exception" in the Act mischaracterizes the inquiry here. The proper question in this case is whether the Act was intended to bar the traditional banking activity of commingling trust assets. *Camp* unequivocally provides a negative answer to that question.

Camp also disposes of petitioner's argument (Pet. 13 n.18) that registration of the trust units as "securities" under the securities laws renders the activity unlawful under the Glass-Steagall Act. In petitioner's view, "any ownership interest in a bank's common trust fund would constitute a security, and all commingling of trust funds by national banks would be effectively prohibited" (Pet. App. 11a). That result is flatly inconsistent with the Court's approval of these activities in *Camp* (see 401 U.S. at 624-625). Petitioner attempts to avoid this anomaly (Pet. 14 n.19) by arguing that banks could continue to commingle trust funds if they refrained from issuing or distributing interests in the common fund. But it is impossible to commingle and invest trust assets without issuing units of participation to the individual settlors to define their interest in the common trust. See 1 Fed. Reg. 420 (1936). Although the Securities and Exchange Commission (SEC) does apply its registration requirements to IRA common trust funds, it has taken no position on whether banks may offer these services under the Glass-Steagall Act. See Pet. App. 106a.

the Court stated in *Camp* was fully consistent with the banking laws. And there is no need for the Court to review the propriety of activities that it already has recognized to be permissible ones that "[b]anks have engaged in * * * for decades" (*Board of Governors* v. *Investment Company Institute*, 450 U.S. at 55).[8]

2. Petitioner challenges the Comptroller's reliance on *Camp* by arguing (Pet. 13-14) that IRA trusts are not bona fide trusts. This claim is entirely without merit. Congress itself has prescribed that an IRA is a "trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" (26 U.S.C. 408(a)). ERISA accordingly imposes a range of fiduciary obligations on the bank as an IRA trustee: the bank is prohibited from self-dealing and has specific reporting requirements (*see* 26 U.S.C. 408(a)(5) and (i), 4975(c)), and the bank as trustee must distribute IRA trust assets in conformity with the settlor's plan in the event of the settlor's death (26 U.S.C. (& Supp. II) 401(a)(9), 408(a)(6)), a recognized trust obligation. See 1 A. Scott, *The Law of Trusts* § 8, at 75 (3d ed.1967).[9] Similarly, the common law imposes numerous fiduciary obligations on the bank as trustee for

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[8] The existence of longstanding regulations specifically authorizing bank collective investment of trust funds (see page 2, *supra*) disproves petitioner's claim (Pet. 3) that the Comptroller has reversed over 50 years of administrative practice. Petitioner is similarly misguided in finding relevance (Pet. 14-15 n.21) in the fact that banks waited eight years after the passage of ERISA to offer their common trust fund services to IRA customers. Prior to 1982, IRAs could be opened only by persons not already covered by a pension plan. IRA common trusts therefore were too small to be operated profitably. When IRA rules were liberalized in 1981, banks promptly offered their common trust services to IRA customers.

[9] Petitioner's claim that the common trust fund here is "identical * * * to *Camp*" (Pet. 6) thus disregards the fact that an IRA common trust, unlike the mutual fund in *Camp*, is a bona fide trust. See *Camp*, 401 U.S. at 622 n.8. Nor does petitioner advance its cause by repeatedly (Pet. 3, 5, 6, 7, 9, 13, 15) arguing that the Glass-Steagall Act pro-

an IRA, including a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries. See Restatement (Second) of Trusts §§ 170, 174, 183 (1959). The role of the banks here is thus far different from the one considered in *Camp*, where the bank acted solely as a managing agent for the accounts of its customers. See *Camp*, 401 U.S. at 622. See generally A. Scott, *supra*, §§ 8-8.1.

ERISA also contains statutory limitations to ensure that IRA trusts are used solely "for retirement savings" (S. Rep. 93-383, 93d Cong., 1st Sess. 132 (1973)), rather than for investment purposes. ERISA thus goes beyond the usual "prudent investment" rule common to the law of trusts and specifically prohibits the investment of IRA funds in instruments that are inconsistent with a retirement purpose. See 26 U.S.C. 408(a)(3) and (m) (barring investment in life insurance contracts or collectibles). IRA contributions are limited to $2,000 annually. See 26 U.S.C. 408(a)(1). Withdrawals from the trust before age 59½ are subject to a 10% penalty. See 26 U.S.C. 219(b), 408(f). Given this intricate and complex congressional and common law scheme designed to ensure that IRAs serve exclusively as retirement trusts, there is no basis for contesting the Comptroller's determination that IRAs are bona fide trusts.[10]

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hibits a bank from operating a mutual fund. It is plain that the bank here is offering fiduciary services—a permissible banking activity—and is not operating a mutual fund.

[10] Petitioner suggests that the individual IRA trusts are somehow not bona fide because they are "standardized, preprinted forms" (Pet. 13, 15). But use of standardized trusts in no way interferes with or minimizes the numerous common law and statutory fiduciary obligations placed on the bank as trustee. Indeed, Congress, when it enacted ERISA, clearly knew that it would be necessary for banks to use standardized IRA trust forms. Congress explained that the IRS was preparing a prototype IRA trust and that failure to use this prototype would require prior approval. See H.R. Conf. Rep. 93-1280, 93d

3. Petitioner raises numerous other arguments in favor of review. All are without merit.

a. Petitioner argues that this case raises "basic questions" about the authority of federal agencies to "rewrite Acts of Congress" (Pet. 15), and that the Comptroller's decision represents the substitution of his views for those of Congress. As the District of Columbia Circuit recognized, "this is not a fair reading of the Comptroller's opinion" (Pet. App. 22a). The Comptroller's detailed and careful analysis (*id.* at 39a-90a) reveals that his decision was based on this Court's decision in *Camp*, which indicated that bank trust activities are fully consistent with the Glass-Steagall Act. There accordingly is no basis for petitioner's assertion that the Comptroller substituted his views for those of Congress.[11]

Cong., 2d Sess. 338 (1974). Petitioner's attempt to buttress this contention by referring (Pet. 14-15) to custodial IRA accounts is unavailing; such accounts are not at issue in this case.

[11] Petitioner errs in relying (Pet. 16 & n.24) on Congress's failure to enact certain amendments to the Glass-Steagall Act to support its assertion that the Comptroller has usurped congressional authority. First, Congress's failure to enact legislation is a notoriously unreliable indicator of congressional intent. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803-804 n.25 (1984); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). In any event, the proposed legislation petitioner cites did not deal with the issue presented in this case; rather, it would have allowed banks to commingle funds for investment purposes – in effect overruling the result in *Camp*. Finally, petitioner fails to note that *it* has unsuccessfully sought legislation to restrict banks' ability to invest funds collectively for IRA, Keogh, and other retirement plans. See *Bank Holding Company Legislation and Related Issues: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking*, 96th Cong., 1st Sess. Pt. 2 1032, 1034-1035 (1979) (statement of Matthew Fink, General Counsel for the Investment Company Institute).

Petitioner attempts to buttress its claim that the Glass-Steagall Act is being administratively repealed by citing (Pet. 18-19 nn.26-30) other regulatory actions taken by the banking agencies and the SEC, and

b. Petitioner next argues (Pet. 16-17) that the Comptroller (and the courts) substituted an ad hoc assessment of the riskiness of the bank activities at issue for the restrictions imposed by Congress. Again, "this is * * * a mischaracterization of the Comptroller's ruling" (Pet. App. 22a). The Comptroller simply followed the lead set by this Court in *Camp* (401 U.S. at 620-629) in determining whether the risks posed by the challenged activities implicate the concerns that underlay the Glass-Steagall Act. And the Comptroller properly concluded (Pet. App. 44a-45a), as did the Court in *Camp,* that the hazards that the Glass-Steagall Act sought to eliminate "are not present when a bank undertakes * * * to commingle assets which it has received for a true fiduciary purpose rather than for investment" (*Camp*, 401 U.S. at 638). In light of *Camp*, the Comptroller's reasoning is unassailable.

In these circumstances, the Comptroller has set forth his reading of the statute with "commendable thoroughness." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 216 (1984).[12] The courts of appeals properly deferred

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other pending Glass-Steagall litigation. The issues raised in these other fora, however, have nothing to do with the resolution of the Glass-Steagall issue in this case; and, as noted above, the SEC has taken no position on whether banks may offer these services under the Glass-Steagall Act (see Pet. App. 106a).

[12] Petitioner argues (Pet. 17) that the Comptroller has adopted a regulatory approach under the Glass-Steagall Act that runs afoul of 12 U.S.C. 93a. But that statute does not deny the Comptroller the authority to interpret the Glass-Steagall Act. Rather, it was enacted to make clear that the Comptroller lacks the authority "to permit otherwise impermissible activities of national banks with specific reference to the * * * Glass-Steagall Act * * *." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 83 (1980). See 126 Cong. Rec. 6901-6902 (1980). As *Camp* demonstrates, the Comptroller here has conferred no such novel authority on national banks.

to his reading of the statute. See *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 7; *Board of Governors* v. *Investment Company Institute*, 450 U.S. at 68.[13] Further review accordingly is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1986

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[13] Contrary to petitioner's claims (Pet. 9, 20), the courts of appeals correctly applied the well established standards for judicial review of agency action. See Pet. App. 14a-23a; 86-153 Pet. App. 3a; 86-154 Pet. App. 5a. Petitioner also argues (Pet. 22 n.34) that deference to the Comptroller was inappropriate because his litigation counsel repudiated the reasoning of his opinion. To support this assertion, petitioner contends that the Comptroller's decision recognized that the definition of securities in the Glass-Steagall Act and Securities Act "are 'synonymous,' " but that the Comptroller later abandoned that position in litigation. The record, however, flatly refutes this contention. The Comptroller's decision specificially states that "[t]his Office has viewed the meaning of the term 'securities' under the securities laws as *not necessarily synon[y]mous* with its meaning under the Glass-Steagall Act" (Pet. App. 44a (emphasis added)). He has adhered to this position throughout this litigation.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40032

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-152, 86-153 and 86-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,
Petitioner,

v.

ROBERT L. CLARKE, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA, SECOND AND NINTH CIRCUITS

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REPLY BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

The lower courts here proclaimed themselves without power to reverse, and therefore upheld, concededly "superficial" administrative rulings that "come perilously close to rejecting the division between commercial banking and investment banking that Congress sought to mandate in Glass-Steagall" (No. 86-153, Pet. 9). One court did so because the rulings were presented in written documents and because the documents purported to apply, "however inadequately," the relevant "mode of analysis" (No. 86-153, Pet. 22). Another court deferred because, even though Congress has refused to amend the Glass-Steagall Act to authorize the precise bank IRA mutual funds at issue, Congress could repair the damage "if it finds itself in disagreement with the actions of the Comptroller or the courts" (No. 86-152, Pet. 23). By defending the notion that the doctrine of judicial deference renders federal courts helpless to prevent administrative "interpretive" dismantling of fundamental federal statutes, even when undertaken in contravention of longstanding policy judgments deliberately made and repeatedly reaffirmed by Congress, Respondents' briefs in opposition confirm and underscore that the Petitions for Certiorari should be granted.

First. The rulings at issue undermine the fundamental legislative purpose of the Glass-Steagall Act by exposing banks to all

the potential conflicts of interest, financial dangers, and other abuses that Congress sought to eliminate by excluding banks from the mutual fund business. *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) (*"Camp"*). Although Respondents' briefs assert that these dangers are not present here (Gov't Br. 16; Banks Br. 18), *the rulings* at issue *concede* their existence, advocating ad-hoc administrative regulation of bank mutual funds as the proposed means to reduce (albeit not eliminate) the dangers Congress feared.[1]

The problem with this solution, however, is that both Congress and this Court repeatedly have rejected it as an inadequate substitute for the structural statutory prohibitions *Congress* deemed necessary to achieve its policy goals. *Securities Industry Association* v. *Board of Governors*, 468 U.S. 134, 153 (1984) (*"Becker"*). As Judge Schwarzer and Judge Coughenour declared below, the Comptroller's rulings "simply disagree with Congressional determinations, enumerated in *Camp* and *Becker*, regarding the potential dangers of commercial bank entry into the field of investment banking" (No. 86-153, Pet. App. 5a, 22a).[2]

Second. Simply ignoring this Court's holding in *Camp*, and their own admissions (No. 86-152, Pet. 5,7; No. 86-153, Pet. 5) and stipulations (No. 86-154, Pet. App. 75a-76a) that the Respondent banks created their IRA funds solely to engage in the mutual fund business, Respondents limit their substantive defense of the rulings to arguing irrelevant issues. It simply is of no moment that Congress may have permitted banks to structure

1. The rulings expressly state that the Comptroller's regulatory authority can only "substantially control," but not preclude, "the types of hazards identified in ICI v. Camp" (No. 86-154, Pet. App. 30a). The rulings also concede that administrative regulation can only "limit the bank's ability" to misuse its credit facilities (*id.* at 26a), "reduce the danger of promotional abuses" (*id.* at 28a) and render "unlikely" or "implausible" at best the widespread occurrence of the other specific dangers which prompted Congress to enact the statutory bar (*id.* at 42a).

2. None of the Respondents confronts the stark reality of this Court's decision in *Becker*. Indeed, the brief of the Federal Respondent off-handedly refers to *Becker* once (Gov't Br. 12 n. 7) while Respondent banks make no mention of *Becker* at all.

IRA accounts in either "trust" or "custodial" form; the dispositive point is that, because the Act's flat prohibitions contain no "trust" exception, they forbid banks to underwrite mutual fund securities to IRA "trust" customers, be they "bona-fide" (Gov't Br. 13-14) or otherwise, just as firmly as Respondents concede the prohibitions to forbid bank underwriting of such securities to IRA (and non-IRA) "agency" customers (No. 86-152, Pet. 12-15).

Similarly, the rulings under review have nothing whatsoever to do with the traditional bank fiduciary service of "commingling" trust assets in common trust funds.[3] Although the Act has been interpreted to permit banks to "pool trust assets" solely as an "aid to the administration" of pre-existing individual trusts, 26 Fed. Res. Bull. 393 (1940), *cited with approval in Camp*, 401 U.S. at 621, 638 n. 37, that traditional administrative "commingling" is *not* the activity at issue here.[4] Rather, the Comptroller has run roughshod over the Act and this Court's decision in *Camp* by authorizing the nation's 33,000 depository institutions to create

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3. Confirmation of this fact is provided by the well-established principle of fiduciary law requiring common trust funds to be maintained under the "exclusive management" of the sponsoring bank. *See* Reg. F, 2 Fed. Reg. 2976 (1937); 12 C.F.R. § 9.18(b)(12). The rulings under review, however, for the first time in the history of bank common trust funds, waive the need for the banks to comply with this requirement in order to permit the banks to vest exclusive management of their IRA funds, as required by the terms of the Investment Company Act of 1940, 15 U.S.C. § 80a-15, in an independent Board of Directors. Notably, Respondents do not even attempt to rebut Judge Schwarzer's holding (No. 86-153, Pet. App. 19a) that bank operation of mutual funds cannot possibly constitute a bona-fide bank fiduciary service since the sponsoring banks are conceded to have transferred their fiduciary responsibilities to outsiders over whom they exercise no power or control.

4. Further confirmation is provided by the federal securities laws, which contain express registration exemptions for bank common trust funds (and interests therein) which are used for this intended fiduciary purpose. It is undisputed that these exemptions were unavailable to the bank IRA mutual funds at issue here (No. 86-152, Pet. 13 n. 18). Although Respondent banks respond that the securities laws are irrelevant in construing the Glass-Steagall Act because the securities laws "were enacted for purposes quite distinct from the purposes of the Glass-Steagall Act" (Banks Br. 13-14), this Court has held to the contrary. *Becker*, 468 U.S. at 150.

"common trust funds," to register those funds as mutual funds with the SEC, to register the shares of those mutual funds as "securities" with the SEC, and to underwrite and distribute those securities to the 111 million members of the nation's work force as investments.[5]

It is this "pioneering" attempt[6] to transform a purely administrative aid to the performance of a bank's bona-fide fiduciary duties as trustee into a vehicle enabling banks to underwrite securities by engaging in the mutual fund business that the Comptroller has sanctioned in these cases. And, it is this "pioneering" attempt to expand the traditional fiduciary role of a bank as trustee to encompass the Congressionally-forbidden role of "market[er]" and "promoter" of securities, *Becker*, 468 U.S. at 154-160, that transgresses the flat prohibitions of the Glass-Steagall Act. For, as this Court held in *Camp*, and as the banking agencies consistently held before the rulings under review, the Act's securities underwriting bar by its terms prohibits banks from "embark[ing] upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." *Camp*, 401 U.S. at 621, 638 n. 37 (quoting 26 Fed. Res. Bull. 393 (1940)).[7]

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5. Respondents' efforts to pretend that the rulings authorize nothing but traditional bank activity (Gov't Br. 13; Banks Br. 9-13) are belied by the American Bankers Association, which has publicly admitted that the rulings at issue represent "the first time" since Congress enacted the Glass-Steagall Act in 1933 that a bank has been allowed to underwrite securities by operating "a common trust fund that has been registered as a mutual fund with the SEC." *Court of Appeals Rules In Favor of Citibank Forming Mutual Fund For IRAs*, Securities Week, May 26, 1986 at 9.

6. *Fund News: Banks, Nukes, Fewer Meetings*, Wall Street Journal, May 28, 1986 at 37 (statement of CBT President James F. McNally).

7. Respondents' insistence that adherence to the Glass-Steagall Act's flat prohibitions would prohibit "all commingling of trust funds by national banks" is misplaced. The Act does not prohibit national banks from having "any connection with" securities; it prohibits banks from engaging "in the business" of "issuing, underwriting, selling, or distributing" securities to the public. A bank does not engage in these prohibited activities when it simply commingles the assets of pre-existing trusts in a common trust fund.

Third. While purporting to support all three contrary appellate decisions below, Respondents do not even attempt to reconcile the various opinions with each other or with the administrative rulings they purport to affirm (Gov't Br. 1-17; Banks Br. 1-20). This omission is hardly surprising. The courts below accorded virtual *"carte blanche"* deference, *Bowen* v. *American Hospital Association,* 106 S.Ct. 2101, 2122 (1986), to the Comptroller's conclusions, while ignoring the shifting and inconsistent rationales proffered by the Comptroller and his litigation counsel (No. 86-152, Pet. 22-23 & nn. 34-35) in an effort to justify the decision to permit banks to enter the mutual fund business. And, to the extent the courts addressed the merits themselves, they not only criticized or abandoned the Comptroller's decisions (No. 86-152, Pet. 8 n. 9; No. 86-153, Pet. 9-10), but adopted sharply divergent bases for their holdings (No. 86-152, Pet. 10-11), leaving the law in a state of internal contradiction and disarray. The resulting chaos is amply demonstrated by the fact that Respondents' briefs bear little resemblance to any administrative or judicial opinion under review and by the irony that the rulings and briefs rely mightily on ERISA (Gov't Br. 12-13; Banks Br. 12-15), while both the District of Columbia and Ninth Circuits flatly rejected the relevance of ERISA to the questions presented here.[8] The need to resolve this chaos alone plainly "warrant[s]" this Court's review (Gov't Br. 17).

Fourth. In an effort to distance these cases from the documented (and undefended) campaign by the Comptroller and other federal banking regulators to rewrite and dismember the Act's prohibitions through administrative "interpretation," the Federal Respondent claims that the numerous other administrative proceedings and revisionist rulings cited by the Institute "have nothing to do with the resolution of the Glass-Steagall issue in this case" (Gov't Br. 15-16 n. 11). Actually, the Comptroller

8. "We also agree with the District of Columbia Circuit that [ERISA] and its legislative history are not relevant in the decision before us" (No. 86-153, Pet. App. 4a n.2; *see* No. 86-152, Pet. App. 14a).

himself specifically has relied upon the appellate opinions under review as support for his unprecedented decision to authorize the nation's banking industry to underwrite bonds[9]—a ruling that Congressional leaders have condemned as part of the Comptroller's ongoing "regulatory assault on the barrier between commercial and investment banking erected by [Congress in] the Glass-Steagall Act."[10] Any possible doubts about the broad impact and nationwide importance of the rulings at issue or of the unbounded and ever-expanding exception they have engrafted upon the Act's unqualified securities underwriting bar already have been dispelled.

Fifth. Respondents do not dispute (Gov't Br. 1-17; Banks Br. 1-20) the far-reaching dangers posed by the decisions below to the carefully balanced and intertwined statutory scheme Congress enacted in 1933 to govern the banking and securities underwriting industries. Nor do they offer any explanation or defense for the radical surgery the SEC already has found it necessary to perform upon its own organic statutes in order to redress the statutory imbalance created by the banking agencies' unilateral repeal of the Glass-Steagall Act's prohibitions (No. 86-152, Pet. 19-20 n. 30).[11] This silence itself confirms that action by this Court is essential, not only to confirm the continuing vitality of the Act's flat prohibitions, but also forcefully to reiterate that, if existing banking statutes are not serving the public interest, "that

9. Letter dated June 18, 1986 from Robert L. Clarke, Comptroller of the Currency, to Senator Alfonse M. D'Amato, Chairman, Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs.

10. Letter dated June 3, 1986 from Senator Alfonse M. D'Amato, Chairman, Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs to Robert L. Clarke, Comptroller of the Currency.

11. Indeed, the General Counsel of the SEC just recently announced that further revisionist action may be necessary now that "banks and securities firms offer functionally similar products—bank sponsored collective investment funds, on the one hand, and mutual funds on the other—under radically different regulatory regimes." *SEC Staffer Eyes Bank Securities Activities In Commercial Paper & Pooled IRA Funds*, 20 Banking Reg. 3 (May 19, 1986).

is a problem for Congress, and not the [banking agencies] or the courts, to address." *Board of Governors* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986).

CONCLUSION

The opinions below, if allowed to stand, will almost certainly signal to lower courts and federal regulators an abdication of the judiciary's duty to interpret faithfully the statutes enacted by Congress and to prevent the administrative dismantling of the fundamental and longstanding expression of national banking policy embodied in the Glass-Steagall Act. Absent action by this Court, bank regulators are likely to continue, as here, to authorize activities in their view of the public interest that Congress deliberately has prohibited (No. 86-152, Pet. 16 & n. 24) and to assume policy decisions of enormous economic significance that properly may be made only by Congress. This Court's intervention thus is critical to reaffirm that "there are limits . . . on how far an agency may go in its interpretive role," and that deference cannot substitute for the judicial "obligation to honor the clear meaning of a statute, as revealed by its language, history and purpose." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 & n.20 (1979).

For the reasons set forth above and in the Petitions themselves, the Petitions for Certiorari should be granted.

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